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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1962

OCTOBER 1, 1962 THROUGH JANUARY 21, 1963

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DEPOSITED BY THE
UNITED STATES OF AMERICA

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.[1]

RETIRED

STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.[2]
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

Notes on p. iv.

NOTES.

[1] THE HONORABLE ARTHUR J. GOLDBERG, formerly Secretary of Labor, was nominated by President Kennedy on August 31, 1962, to be an Associate Justice of this Court. He was confirmed by the Senate on September 25, 1962; he was commissioned on September 28, 1962; and he took his oaths and his seat on October 1, 1962. See *post*, p. XV.

[2] MR. JUSTICE FRANKFURTER retired effective August 28, 1962. See *post*, p. VII.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ARTHUR J. GOLDBERG, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 15, 1962.

(For next previous allotment, see 370 U. S., p. IV.)

RETIREMENT OF MR. JUSTICE FRANKFURTER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 1, 1962.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE.

THE CHIEF JUSTICE said:

With the concurrence of my colleagues, I announce with regret the retirement of Mr. Justice Frankfurter who has served this Court with distinction for the past 24 years.

All of us, with the exception of Mr. Justice White, have had the pleasure of serving for years with him, and we exceedingly regret that the condition of his health compelled his retirement. We are reconciled to the situation, however, by the opinion of his doctor that if he is relieved of his arduous Court work he will still have years of usefulness to the profession to which he has been devoted for 60 years. We look forward to such a speedy and complete recovery because he has so much to give from his vast experience.

As scholar, teacher, public servant, enlightened critic, and member of this Court for almost a quarter of a century, he has already made a contribution to our jurisprudence rarely equalled in the life of our Court. Through each of these facets of his long and notable career, he looms large in the history of our country and we, his colleagues, have been the most favored beneficiaries of his

wisdom and his fellowship. These we may continue to enjoy because our association with him is not ended. It will continue unabated in another form.

Our appreciation of that association and for his great service to the Court is amplified in a letter to him which, with his response and the exchange of letters between him and the President on the occasion of his retirement, will be spread upon the Minutes of the Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington 25, D. C., September 27, 1962.

Honorable FELIX FRANKFURTER,
Associate Justice of the Supreme Court, Retired,
Washington, D. C.

DEAR JUSTICE FRANKFURTER:

As the opening day of our 1962 Term approaches, it becomes increasingly difficult for all of us to realize that you will not be in your accustomed chair, which you filled with such distinction and in such good fellowship with your colleagues for almost a quarter of a century.

All of us, except Mr. Justice White, our newest member, have served with you for years and we, more than any others, will feel the loss that comes from your retirement. We regret the necessity for it, but we reluctantly accept your decision because your doctor has told you and us that if this course is pursued there will be opened to you new avenues of usefulness to the profession to which you dedicated yourself 60 years ago.

Every one of those years was an eventful year for you as you strained every fiber of your mind and body to the administration of justice and to the welfare of the Court.

Few men in the life of the Supreme Court have made contributions to its jurisprudence equal to your own. As a scholar, teacher, critic, public servant, and a member of the Court for 24 Terms, you have woven your philosophy of law and your conception of our institutions into its annals where all may read them and profit thereby.

Your retirement does not end our association. It merely changes the form of it. You will always be one of us, and after rest and relaxation from the rigors of the Court work restore you to health, we look forward to years of continued happy association with you. In the meantime, our best wishes for a rapid recovery will always be with you.

Sincerely,

EARL WARREN
HUGO L. BLACK
WM. O. DOUGLAS
TOM C. CLARK
JOHN M. HARLAN
WM. J. BRENNAN, JR.
POTTER STEWART
BYRON R. WHITE

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE FELIX FRANKFURTER,
Washington, D. C., September 28, 1962.

MY DEAR BRETHREN:

It would be unnatural for me not to address you thus, although you have been apprised that I have advised the President of my decision to retire as of August 28th, under the appropriate provisions of law, as an active member of the Court. I still address you as I do, for

the endeavors which the business of the Court entails in the daily intimacy of our association have forged bonds of fellowship which cannot be abruptly severed. The final manifestation of your fraternal feelings toward me, your letter of September 27th, your generous words of farewell, are a cheering close to our uniformly happy curial relations over the years, and I shall enduringly cherish your moving letter. Retiring from active membership on the Court of itself would involve a wrench in my life, but the fact is that I have served the Court in one professional way or another almost from the day that I ceased to be a law student, not merely during the years that I have actually been on the Bench.

My years on the Court have only deepened my conviction that its existence and functioning according to its best historic traditions are indispensable for the well-being of the nation. The nature of the issues which are involved in the legal controversies that are inevitable under our constitutional system does not warrant the nation to expect identity of views among the members of the Court regarding such issues, nor even agreement on the routes of thought by which decisions are reached. The nation is merely warranted in expecting harmony of aims among those who have been called to the Court. This means pertinacious pursuit of the processes of Reason in the disposition of the controversies that come before the Court. This presupposes intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. This in turn requires rigorous self-scrutiny to discover, with a view to curbing, every influence that may deflect from such disinterestedness.

I have spent happy years in my fellowship with you and I carry away the abiding memory of years of comradeship in grappling with problems worthy of the best in fallible men.

My best wishes for happy, long years for each of you and continued satisfying labors, and every good wish that the Court may continue its indispensable role in the evolution of our beloved nation.

With the happiest memories, I am

Sincerely and faithfully yours,

FELIX FRANKFURTER.

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE FELIX FRANKFURTER,
Washington 25, D. C., August 28, 1962.

MY DEAR MR. PRESIDENT:

Pursuant to the provisions of 28 U. S. C. Section 371(b), 68 Stat. 12, I hereby retire at the close of this day from regular active service as an Associate Justice of the Supreme Court of the United States.

The occasion for my retirement arises from the affliction which I unexpectedly suffered last April. Since then I have undergone substantial improvement. High expectations were earlier expressed by my doctors that I would be able to resume my judicial duties with the beginning of the next Term of the Court, commencing October 1. However, they now advise me that the stepped-up therapy essential to that end involves hazards which might jeopardize the useful years they anticipate still lie ahead of me.

The Court should not enter its new Term with uncertainty as to whether I might later be able to return to unrestricted duty. To retain my seat on the basis of a diminished work schedule would not comport with my

own philosophy or with the demands of the business of the Court. I am thus left with no choice but to regard my period of active service on the Court as having run its course.

I need hardly tell you, Mr. President, of the reluctance with which I leave the institution whose concerns have been the absorbing interest of my life. May I again convey to you my gratitude for your call upon me during the summer and for the solicitude you were kind enough to express.

With high respect and esteem,

Faithfully yours,

FELIX FRANKFURTER.

THE PRESIDENT,
The White House,
Washington, D. C.

THE WHITE HOUSE,
Washington, August 28, 1962.

MY DEAR MR. JUSTICE FRANKFURTER:

Your retirement from regular active service on the Supreme Court ends a long and illustrious chapter in your life, and I understand well how hard a choice you have made. Along with all your host of friends I have followed with admiration your gallant and determined recovery, and I have shared the general hope that you would return soon to the Court's labors. From my own visit I know of your undiminished spirit and your still contagious zest for life. That you now take the judgment of the doctors and set it sternly against your own demanding standard of judicial effectiveness is characteristic, but it comes as an immediate disappointment.

Still, if you will allow it, I will say that there is also consolation in your decision. I believe it good for you as

well as for the rest of us that you should now be free, in reflective leisure, for activities that are impossible in the demanding life of a Justice of the Supreme Court. You have been part of American public life for well over half a century. What you have learned of the meaning of our country is reflected, of course, in many hundreds of opinions, in thousands of your students, and in dozens of books and articles. But you have a very great deal still to tell us, and therefore I am glad to know that the doctors are telling you, in effect, not to retire, but only to turn to a new line of work, with new promise of service to the nation.

Meanwhile, I should like to offer to Mrs. Frankfurter and to you, for myself and for all Americans, our respectful gratitude for the character, courage, learning and judicial dedication with which you have served your country over the last twenty-three years.

Sincerely,

JOHN KENNEDY.

The Honorable FELIX FRANKFURTER,
Associate Justice,
Supreme Court of the United States,
Washington, D. C.

APPOINTMENT OF MR. JUSTICE GOLDBERG.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 1, 1962.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE.

THE CHIEF JUSTICE [after announcing the retirement of MR. JUSTICE FRANKFURTER, *ante*, p. VII] said:

We are fortunate, however, that his successor was appointed to fill the vacancy before the opening of our 1962 Term. We welcome him today.

The President, with the advice and consent of the Senate, has appointed the Honorable Arthur J. Goldberg of Illinois, former Secretary of Labor, an Associate Justice of the Supreme Court. Justice Goldberg has taken the Constitutional Oath administered by the Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the Bench.

The Clerk then read the commission as follows:

JOHN F. KENNEDY,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Arthur J.

Goldberg of Illinois I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Arthur J. Goldberg during his good behavior.

IN TESTIMONY WHEREOF, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this twenty-eighth day of September, in the year of our Lord one thousand nine hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-seventh.

[SEAL] JOHN F. KENNEDY.

By the President:
ROBERT F. KENNEDY
Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE GOLDBERG was escorted by the Marshal to his seat on the bench.

The oaths taken by MR. JUSTICE GOLDBERG are in the following words, viz:

I, Arthur J. Goldberg, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose

of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

ARTHUR J. GOLDBERG.

Subscribed and sworn to before me this first day of October A. D., 1962.

EARL WARREN,
Chief Justice of the United States.

I, Arthur J. Goldberg, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

So help me God.

ARTHUR J. GOLDBERG.

Subscribed and sworn to before me this first day of October, 1962.

JOHN F. DAVIS,
Clerk of the Supreme Court of the United States.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1962.

HONEYWOOD ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 177. Decided October 8, 1962.

Affirmed.

Moses M. Falk for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Irving Galt,* Assistant Solicitor General, and *Sheldon Raab,* Deputy Assistant Attorney General, for appellees.

PER CURIAM.

Since we agree with the District Court, from our examination of the record, "that no good cause has been shown for the granting of a preliminary injunction in advance of a trial upon which the facts necessary for a determination of the merits of this action can be fully developed," the motion to affirm is granted and the judgment of the District Court is affirmed.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

BEL OIL CORP. *v.* COCREHAM, COLLECTOR OF REVENUE OF LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 123. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 242 La. 498, 137 So. 2d 308.

Howard B. Gist for appellant.

Chapman L. Sanford for appellee.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

UNITED STATES *v.* BROWN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 128. Decided October 8, 1962.

204 F. Supp. 407, reversed.

Solicitor General Cox, Assistant Attorney General Loevinger and *Lionel Kestenbaum* for the United States.

PER CURIAM.

The judgment is reversed. *United States* v. *Wise,* 370 U. S. 405.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

RAGAN *v.* CITY OF SEATTLE ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 121. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 58 Wash. 2d 779, 364 P. 2d 916.

Francis Hoague for appellant.

A. C. Van Soelen for City of Seattle, appellee.

J. Duane Vance and *William S. Howard, Jr.* for Washington Music Merchants, Inc., intervening appellee.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

ERRINGTON *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 157. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 355 S. W. 2d 952.

Walter A. Raymond and *Kenneth C. West* for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

CANNATA ET AL. *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 163. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 N. Y. 2d 210, 182 N. E. 2d 395.

Raphael H. Weissman for appellants.

Leo A. Larkin and *Pauline K. Berger* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

WAXMAN ET AL. *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 274. Decided October 8, 1962.

203 Va. 257, 123 S. E. 2d 381, reversed.

Morris P. Glushien for appellants.

Robert Y. Button, Attorney General of Virginia, and *Kenneth C. Patty* and *D. Gardiner Tyler*, Assistant Attorneys General, for appellee.

PER CURIAM.

The judgments are reversed. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE ET AL. *v.* CITY OF ANCHORAGE.

APPEAL FROM THE SUPREME COURT OF ALASKA.

No. 223. Decided October 8, 1962.

Appeal dismissed and certiorari denied.
Reported below: — Alaska —, 368 P. 2d 540.

George E. C. Hayes for appellants.

Charles S. Rhyne for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

FULGHUM *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 244, Misc. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 242 La. 767, 138 So. 2d 569.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA.

No. 247. Decided October 8, 1962.

205 F. Supp. 360, affirmed.

Albert B. Russ, Jr., C. Baxter Jones, Herman Heyman, W. L. Grubbs, Prime F. Osborn and *Homer S. Carpenter* for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Elliott H. Moyer and *Robert W. Ginnane* for the United States et al.

Charles J. Bloch, Henry J. Karison and *R. Granville Curry* for appellee carriers.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

POINDEXTER *v.* McGEE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 297, Misc. Decided October 8, 1962.

PER CURIAM.

The appeal is dismissed.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

HARRIS *v.* FLORIDA REAL ESTATE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 100. Decided October 8, 1962.

Appeal dismissed and certiorari denied.
Reported below: 134 So. 2d 785.

M. H. Rosenhouse for appellant.

Benjamin T. Shuman for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

READEY ET AL. *v.* ST. LOUIS COUNTY WATER CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 105. Decided October 8, 1962.

Appeal dismissed and certiorari denied.
Reported below: 352 S. W. 2d 622.

J. L. London for appellants.

Richard E. Crowe, Dan D. Weiner and *William J. Becker* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

GEORGIA ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 114. Decided October 8, 1962.

201 F. Supp. 813, affirmed.

Eugene Cook, Attorney General of Georgia, and *Paul Rodgers,* Assistant Attorney General, for appellants.

Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene and *Robert W. Ginnane* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

LASSITER ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 116. Decided October 8, 1962.

203 F. Supp. 20, affirmed.

Jack P. F. Gremillion, Attorney General of Louisiana, *George Ponder* and *William P. Schuler,* Assistant Attorneys General, and *Albin P. Lassiter* for appellants.

Solicitor General Cox, Assistant Attorney General Marshall, Howard A. Glickstein and *Bernard A. Gould* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

WELLENS *v.* DILLON, SECRETARY OF THE TREASURY, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 122. Decided October 8, 1962.

Appeal dismissed and certiorari denied.

Reported below: 302 F. 2d 442.

Appellant *pro se.*

Solicitor General Cox, Acting Assistant Attorney General Guilfoyle and *Morton Hollander* for appellees.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

UNITED STATES *v.* WOODSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 162. Decided October 8, 1962.

198 F. Supp. 582, reversed.

Solicitor General Cox, Assistant Attorney General Loevinger and *Lionel Kestenbaum* for the United States.

John J. Carmody, John J. Wilson, Charles J. Steele, Francis J. Kelly, Lawrence J. Latto, Francis M. Shea, Richard T. Conway, Ellsworth T. Simpson, William F. Kelly, Richard H. Nicolaides and *W. V. T. Justis* for appellees.

PER CURIAM.

The judgment is reversed. *United States* v. *Wise*, 370 U. S. 405.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

HOUSEHOLD FINANCE CORP. *v.* DIRECTOR OF THE DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 237. Decided October 8, 1962.

Appeal dismissed and certiorari denied.

Reported below: 36 N. J. 353, 177 A. 2d 738.

Roger C. Ward for appellant.

Arthur J. Sills, Attorney General of New Jersey, and *Alan B. Handler,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

CARR *v.* NEW YORK.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

No. 265. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 15 App. Div. 2d 709, 223 N. Y. S. 2d 229.

Irwin N. Wilpon for appellant.

Louis J. Lefkowitz, Attorney General of New York, and *Paxton Blair*, Solicitor General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

BARTON *v.* DISTRICT COURT OF IOWA IN AND FOR UNION COUNTY.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 31, Misc. Decided October 8, 1962.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Evan Hultman, Attorney General of Iowa, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

FLEISCHER *v.* W. P. I. X., INC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 78, Misc. Decided October 8, 1962.

Appeal dismissed for want of a substantial federal question.

Gustave B. Garfield for appellant.

Daniel Huttenbrauck and *Seymour Shainswit* for appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

PACCIONE *v.* HERITAGE, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 98, Misc. Decided October 8, 1962.

Certiorari granted; judgment vacated; and cause remanded for further proceedings according petitioner an opportunity to present oral argument on merits.

Reported below: 301 F. 2d 702.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene and *David Rubin* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon the suggestion of the Solicitor General and an examination of the entire record, the judgment of the United States Court of Appeals for the Fifth Circuit is vacated and the case is remanded to that court for further proceedings in which the petitioner is to be accorded the opportunity to present oral argument on the merits of his appeal, either personally or through counsel, to the same extent as such opportunity is accorded to the United States Attorney.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

UNITED STATES *v.* HALEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 148. Decided October 15, 1962.*

1. This Court's decision *per curiam*, 358 U. S. 644, reversing the judgment below on the Government's earlier direct appeal in this case, necessarily established that (1) this Court had jurisdiction over that appeal, (2) the relevant provisions of the Agricultural Adjustment Act of 1938 embraced the conduct of appellee complained of, (3) the Act was constitutional as applied in the premises, and (4) the Government was entitled to the relief sought, subject only to the District Court's resolution of appellee's procedural defense to the effect that the Government had failed to comply with conditions requisite to the effective establishment of a wheat acreage allotment for appellee. Pp. 19–20.
2. In No. 139, Misc., the Government's motion for leave to file a petition for writ of mandamus and its petition for writ of mandamus are granted; but the formal writ will not be issued if the District Court promptly takes steps (1) to set aside its order of February 26, 1962, denying the Government's motion for judgment, (2) to proceed to resolve Haley's procedural defense, (3) if such defense is found to be insufficient, to enter final judgment in favor of the United States, and (4) if such defense is found sufficient, to enter judgment accordingly. P. 20.
3. In view of the disposition of No. 139, Misc., it is not necessary to consider whether this Court has jurisdiction over the Government's appeal in No. 148, and that appeal is dismissed. P. 20.

Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal and *David L. Rose* for the United States.

James P. Donovan for appellee in No. 148.

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*Together with No. 139, Misc., *United States* v. *United States District Court for the Northern District of Texas*, on motion for leave to file petition for writ of mandamus and on petition for writ of mandamus.

PER CURIAM.

The order of the District Court, dated February 26, 1962, denying the motion of the United States for judgment in this action evidently rested on a misconception of the scope and effect of this Court's *per curiam* opinion on the Government's earlier appeal, 358 U. S. 644, and of its judgment issued February 24, 1959. In light of the issues tendered in the papers filed on that appeal there can be no doubt that this Court's judgment finally established the Government's right to the relief sought in this action, subject only to the District Court's resolution of Haley's procedural defense, still unadjudicated, to the effect that the Government had failed to comply with conditions requisite to the effective establishment of a wheat acreage allotment for Haley. See Jurisdictional Statement of the United States and Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm in No. 587, October Term, 1958; Appellee's Motion to Vacate the Court's Judgment of February 24, 1959, denied April 27, 1959, 359 U. S. 977; and Appellee's Motion for Rehearing, denied April 27, 1959, 359 U. S. 981.

More particularly, this Court then necessarily decided (1) that it had jurisdiction over such appeal; (2) that the relevant provisions of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U. S. C. § 1281 *et seq.*, embraced the conduct of Haley complained of in this action; and (3) that the Act was constitutional as applied in the premises. Under the remand ordered by this Court's judgment of February 24, 1959, there was thus left open to the District Court only the adjudication of Haley's above-mentioned procedural defense. The District Court erred in believing that it was not foreclosed from inquiring into this Court's jurisdiction over the

Government's appeal and from reinstating its own original judgment in the case, which appears to have been the effect of its denial of the Government's motion for judgment following remand. See *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255.

The District Court's error should be rectified without delay, and we think that the proper means for accomplishing this is by mandamus. 28 U. S. C. § 1651; see *In re Potts*, 166 U. S. 263; *United States* v. *United States District Court*, 334 U. S. 258, 263, 264. Accordingly, in No. 139, Misc., the Government's motion for leave to file a petition for a writ of mandamus, and its petition for a writ of mandamus, are granted.

We shall not, however, issue a formal writ at this time, since we are confident that the District Court, once its misconception of our judgment of February 24, 1959, has been called to its attention, will promptly take steps (1) to set aside its order of February 26, 1962, denying the motion of the United States for judgment; (2) to proceed to resolve Haley's aforesaid procedural defense; (3) if such defense is found to be insufficient, to enter a final judgment in this action in favor of the United States; and (4) if such defense is found sufficient, to enter judgment accordingly. Cf. *Ex parte Northern Pac. R. Co.*, 280 U. S. 142, 530.

In view of our disposition in No. 139, Misc., it becomes unnecessary to consider whether this Court has jurisdiction over the Government's appeal in No. 148, and the motion to dismiss the appeal in that case is accordingly granted and the appeal is dismissed.

It is so ordered.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of these cases.

UNITED STATES ET AL. *v.* DEPARTMENT OF REVENUE OF ILLINOIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 235. Decided October 15, 1962.

202 F. Supp. 757, affirmed.

Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz and *William Massar* for the United States.

John H. Caruthers for Olin Mathieson Chemical Corp., appellant.

PER CURIAM.

The judgment is affirmed.

SOUTHEASTERN AVIATION, INC., DOING BUSINESS AS SOUTHEAST AIRLINES, *v.* HURD, ADMINISTRATOR.

APPEAL FROM THE SUPREME COURT OF TENNESSEE, EASTERN DIVISION.

No. 286. Decided October 15, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 209 Tenn. 639, 355 S. W. 2d 436.

Russell R. Kramer and *Erma Griffith Greenwood* for appellant.

Howard E. Wilson and *Preston H. Taylor* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

PEERLESS STAGES, INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 262. Decided October 15, 1962.

Affirmed.

Frederick Bernays Wiener and *Spurgeon Avakian* for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane and *Arthur J. Cerra* for the United States and the Interstate Commerce Commission.

Owen Jameson for Greyhound Corporation, appellee.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

PULLEY *v.* PULLEY.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 291. Decided October 15, 1962.

Appeal dismissed and certiorari denied.
Reported below: 256 N. C. 600, 124 S. E. 2d 571.

Guy Elliott for appellant.

Glenn L. Hooper, Jr. for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

WASSERMANN *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 312. Decided October 15, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 N. Y. 2d 173, 182 N. E. 2d 264.

Jacob Rassner for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MILLER *v.* LAKE, SECRETARY OF STATE OF TEXAS.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 415. Decided October 15, 1962.

Appeal dismissed for want of a substantial federal question.

John J. Herrera for appellant.

Will Wilson, Attorney General of Texas, and *William E. Allen* and *H. Grady Chandler,* Assistant Attorneys General, for appellee.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

UTAH PHARMACEUTICAL ASSOCIATION *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

No. 277. Decided October 15, 1962.

201 F. Supp. 29, affirmed.

Arthur B. Hanson and *Emmett E. Tucker, Jr.* for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger and *Lionel Kestenbaum* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

DAVIDSON *v.* LAVALLEE, WARDEN.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 446, Misc. Decided October 15, 1962.

Appeal dismissed and certiorari denied.
Reported below: 301 F. 2d 902.

Jacques M. Schiffer for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JONES *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 49, Misc. Decided October 15, 1962.

Certiorari granted; judgment vacated and case remanded for consideration in light of *Coppedge* v. *United States*, 369 U. S. 438.

Petitioner *pro se*.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for reconsideration in light of *Coppedge* v. *United States*, 369 U. S. 438.

VITORATOS *v.* YACOBUCCI, CLERK.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 408, Misc. Decided October 15, 1962.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BOSTON & MAINE RAILROAD ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 230. Decided October 15, 1962.

208 F. Supp. 661, affirmed.

Joseph F. Eshelman, James Garfield, Conrad W. Oberdorfer, Kenneth H. Lundmark, R. G. Bleakney, Jr., R. D. Brooks, R. B. Claytor, E. A. Kaier, W. T. Pierson and *D. M. Tolmie* for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Elliott H. Moyer and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission.

R. Wray Henriott, W. L. Grubbs and *Joseph L. Lenihan* for the Louisville & Nashville Railroad Co. et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

GARVIN *v.* COCHRAN, CORRECTIONS DIRECTOR.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 13, Misc., and No. 24, Misc. Decided October 15, 1962.

Certiorari granted. In view of suggestion of mootness because of petitioner's death, judgments vacated and causes remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. In view of the representations of the Attorney General of Florida that these actions for habeas corpus have become moot by reason of the death of the petitioner, the judgments of the Supreme Court of Florida are vacated and the causes are remanded for such proceedings as that court may deem appropriate.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of these cases.

WALTON *v.* ARKANSAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 18, Misc. Decided October 22, 1962.

Certiorari granted; judgment vacated; and case remanded for consideration in light of *Hamilton* v. *Alabama*, 368 U. S. 52.

Reported below: 233 Ark. 999, 350 S. W. 2d 302.

John C. Finley, Jr. for petitioner.

Frank Holt, Attorney General of Arkansas, and *Thorp Thomas* and *Jack L. Lessenberry*, Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

In this capital case the Supreme Court of Arkansas sustained petitioner's conviction against the claim, among others, that in violation of the Fourteenth Amendment to the Constitution of the United States his involuntary confession of the crime was introduced in evidence at the trial. *Walton* v. *State*, 233 Ark. 999, 350 S. W. 2d 302. Petitioner contends that independently of this claim his conviction was unconstitutional because he was not represented by counsel at the time of his arraignment in the course of which he acknowledged the voluntariness of his confession, such acknowledgment being later used in evidence against him at the trial.

When the Arkansas Supreme Court decided this case it did not have the benefit of this Court's decision in *Hamilton* v. *Alabama*, 368 U. S. 52, which was rendered subsequent to the state court's decision and on the same day that it denied rehearing upon a petition filed prior

to the announcement of the *Hamilton* case. Further, we are unable to conclude from the record filed in this Court either that petitioner had counsel at the time of the arraignment proceedings or, if not, that he was advised of his right to have counsel at such proceedings and that he understandingly and intelligently waived that right.

In these circumstances we conclude that the judgment of the Supreme Court of Arkansas should be vacated and the case remanded to that court for further consideration in light of *Hamilton* v. *Alabama, supra,* or for such other appropriate proceedings as may be available under state law for resolution of this constitutional claim.

It is so ordered.

IOANNOU *v.* NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 191. Decided October 22, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 N. Y. 2d 740, 181 N. E. 2d 456.

Sydney J. Schwartz for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Daniel M. Cohen,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I think this appeal presents substantial federal questions and that jurisdiction should be noted.

Under § 269 of the New York Surrogate's Court Act (now § 269–a) a Czechoslovakian beneficiary of a New York estate has been denied the power to make a gift of her interest in the estate to her niece residing in England. This result flows from a determination by the Surrogate's Court of Bronx County that under its present government conditions are such in Czechoslovakia that it is unlikely the beneficiary would be able to enjoy her interest. Therefore its use was denied her entirely, though none of it, so far as this record shows, will ever reach Czechoslovakia.

Czechoslovakia, though Communist, is a sovereign state recognized by the United States. The descent and dis-

tribution of property in one state to the citizens of another state is clearly a proper subject of international relations. See *Geofroy* v. *Riggs,* 133 U. S. 258. The Constitution by Art. I, § 10, imposes severe limitations on the several States' power to affect the foreign relations of the United States. "[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *United States* v. *Belmont,* 301 U. S. 324, 331. Thus, if New York has, in effect, regulated an area of our international relations that should be regulated only by the Federal Government, or if the New York statute conflicts with existing federal policy, then that statute cannot be given effect. For "[i]f state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power." *United States* v. *Pink,* 315 U. S. 203, 232. Cf. *Brown* v. *Maryland,* 12 Wheat. 419.

Many areas of our law reflect the view that foreign policy can be shaped solely by the Federal Government. Our courts will not inquire into the validity of an act of a recognized foreign state (*Oetjen* v. *Central Leather Co.,* 246 U. S. 297), even though the act is attacked on the ground that it had been enacted by an unfriendly nation and is violative of United States public policy, *Bernstein* v. *Van Heyghen Freres S. A.,* 163 F. 2d 246; *Pons* v. *Republic of Cuba,* 294 F. 2d 925. Likewise, a foreign country is immune from suit for injuries caused in its commercial transactions (*Berizzi Bros. Co.* v. *The Pesaro,* 271 U. S. 562), even though this result is not required by international law (Restatement, Foreign Relations Law of the United States, proposed official draft, 1962, § 72). But, if the Executive Department of the Federal Government indicates its views on whether

immunity should be allowed, those views will control. *Republic of Mexico* v. *Hoffman,* 324 U. S. 30.

Admittedly, the several States have traditionally regulated the descent and distribution of estates within their boundaries. This does not mean, however, that their regulations must be sustained if they impair the effective exercise of the Nation's foreign policy. See Miller, The Corporation as a Private Government in the World Community, 46 Va. L. Rev. 1539, 1542–1549. Where those laws conflict with a treaty, they must give way to the superior federal policy. See *Kolovrat* v. *Oregon,* 366 U. S. 187. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. As we stated in *Hines* v. *Davidowitz,* 312 U. S. 52, 64: "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Certainly a State could not deny admission to a traveler from Czechoslovakia nor bar its citizens from going there. *Passenger Cases,* 7 How. 283; *Crandall* v. *Nevada,* 6 Wall. 35; cf. *Kent* v. *Dulles,* 357 U. S. 116. The present restraints are not as gross an intrusion in the federal domain as those others would be. Yet they affect international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. Chaitkin, The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents, 25 So. Calif. L. Rev. 297.

The issue is of importance to our foreign relations and I think this Court should decide whether, under existing federal policy and practice, the New York statute should be given effect. The issue was raised in No. 123, 1953 Term, where the appeal was dismissed. *In re Braier,* 305 N. Y. 148, 111 N. E. 2d 424, app. dism. *sub nom.*

Kalmane v. *Green*, 346 U. S. 802. JUSTICES BLACK, DOUGLAS, and BURTON voting to note jurisdiction. The question seems substantial and does not seem to be foreclosed by *Clark* v. *Allen*, 331 U. S. 503. We should note jurisdiction and ask the Solicitor General to file a brief.

A substantial question of due process is also tendered. In New York the Surrogate apparently holds no hearing but simply determines that any payments to or by people behind the "iron curtain" are barred by the statute. See *In re Geiger*, 7 N. Y. 2d 109, 164 N. E. 2d 99. But, as said by Judge Froessel (and Judge Fuld) dissenting in that case:

> "Had the Surrogate held a hearing, it might well have been developed, as alleged in the petition, that the beneficiaries are 'all of advanced age, who are [now] living [in Hungary] under difficult conditions and are in great need of assistance', and that monetary assistance 'can be transferred to them by sending food and clothing packages to each of them . . . free of duty and of any taxation'. It might well have been further developed that these nationals have no way of leaving Hungary; that they are the very victims of the 'events in Hungary' to which the Surrogate referred; that they will probably die there and never receive the benefit of their legacies if the moneys are withheld; and that there are agencies which can assure delivery of food and clothing packages in reasonable amounts to named individuals.
>
> "It seems to me that the Surrogate abused his discretion in failing to grant a hearing so that these facts might have been developed and the matter decided, not on the basis of an application to pay legacies to iron-curtain country nationals, but on the application as made, namely, to allow reasonable sums of money for conversion into food and clothing

packages upon a proper showing that they would reach the beneficiaries." 7 N. Y. 2d, at 113–114, 164 N. E. 2d, at 101–102.

This means that no one residing in Czechoslovakia may receive or make any disposition of property under a will probated in New York, even though it is done without the intercession of the foreign government or in fact without its knowledge, and even though there is no danger of the funds being confiscated or in fact being within Czechoslovakia's reach. If New York's purpose is to preclude unfriendly foreign governments from obtaining funds that will assist their efforts hostile to this Nation's interests, as *In re Getream's Estate,* 200 Misc. 543, 107 N. Y. S. 2d 225, and *In re Renard's Estate,* 179 Misc. 885, 39 N. Y. S. 2d 968, suggest, the complete prohibition of assignments made in those countries may have some basis in reason. But, if this is the purpose behind the statute, it seemingly is an attempt to regulate foreign affairs. If the statute is designed to effectuate the testator's intent, as appellees seem to argue, it would seem to have no basis in reason.

Viktoria Miculka, who was a distributee of an estate of a New York decedent, assigned at the American Embassy in Prague her interest in the estate to petitioner, her niece who lives in London. There is no connection between the fund in New York and Czechoslovakia because of the fact that Viktoria Miculka resides in Czechoslovakia. There is no evidence whatsoever that any of the funds will ever reach Czechoslovakia. Viktoria Miculka is an old woman who will probably never leave her homeland. An irrebuttable presumption that the testator would not have wanted his beneficiary to make a voluntary assignment of his interest under these circumstances flies in the face of reason and common sense and is as questionable as the one sought to be sustained in *Tot* v. *United States,* 319 U. S. 463.

KAVANAGH ET AL. *v.* BROWN, TREASURER OF MICHIGAN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 299. Decided October 22, 1962.

206 F. Supp. 479, affirmed.

Thomas M. Kavanagh and *Eugene F. Black*, appellants, *pro se*.

Frank J. Kelley, Attorney General of Michigan, *Eugene Krasicky*, Solicitor General, and *Stanton S. Faville*, Chief Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

CITY OF AKRON ET AL. *v.* OHIO EX REL. McELROY, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 327. Decided October 22, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 173 Ohio St. 189, 181 N. E. 2d 26.

James V. Barbuto and *Sal Germano* for appellants.

Mark McElroy, Attorney General of Ohio, and *Theodore R. Saker* and *Jay C. Flowers*, Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GEER, EXECUTOR, ET AL. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 304. Decided October 22, 1962.

Appeal dismissed and certiorari denied.
Reported below: 173 Ohio St. 264, 181 N. E. 2d 268.

H. Herschel Hunt for appellants.

Mark McElroy, Attorney General of Ohio, and *Theodore R. Saker* and *Joseph L. White,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

CONSOLIDATED ROCK PRODUCTS CO. ET AL. *v.* CITY OF LOS ANGELES.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 307. Decided October 22, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 57 Cal. 2d 515, 370 P. 2d 342.

Howard C. Westwood for appellants.

Roger Arnebergh and *Bourke Jones* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

ALABAMA ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 324. Decided October 22, 1962.

Certiorari granted and judgment affirmed.

Reported below: 304 F. 2d 583.

MacDonald Gallion, Attorney General of Alabama, and *Willard W. Livingston, Leslie Hall* and *Gordon Madison,* Assistant Attorneys General, for petitioners.

Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene and *David Rubin* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is affirmed. *United States* v. *Thomas,* 362 U. S. 58.

UNITED STATES *v.* LOEW'S INCORPORATED ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 42. Argued October 16, 1962.—Decided November 5, 1962.*

1. Section 1 of the Sherman Act was violated when individual distributors of copyrighted feature motion picture films for television exhibition engaged in block booking such films to television broadcasting stations—*i. e.*, conditioning the license or sale of the right to exhibit one or more feature films upon acceptance by each station of a package or block of films containing one or more unwanted or inferior films—even in the absence of any combination or conspiracy between the distributors and any monopolization or attempt to monopolize. Pp. 39–50, 52.
2. The fact that, on the records in these cases, each defendant was found to have entered into a comparatively small number of illegal contracts did not make it improper for the District Court to grant injunctive relief. Pp. 50–51.
3. The block booking engaged in by one of the defendants cannot be justified or excused by its plea of business necessity, since the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct was compelled by contractual obligations to a third party. Pp. 51–52.
4. The decrees entered by the District Court should be amended so as to:

   (a) Require the defendants to price films individually and offer them on a picture-by-picture basis. Pp. 52–54.

   (b) Prohibit differentials in price between a film when sold individually and when sold as part of a package, except when such price differentials are justified by relevant and legitimate cost considerations. Pp. 54–55.

   (c) Proscribe "temporary" refusals by a distributor to deal on less than a block basis, except that a distributor may briefly defer licensing or selling to a customer pending the expeditious conclusion

*Together with No. 43, *Loew's Incorporated et al.* v. *United States*, and No. 44, *C & C Super Corp.* v. *United States*, also on appeals from the same Court.

of bona fide negotiations already being conducted with a competing station on a proposal wherein the distributor has simultaneously offered to license or sell films either individually or in a package. P. 55.

189 F. Supp. 373, judgments vacated and causes remanded.

Daniel M. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum* and *Richard A. Solomon.*

Louis Nizer argued the cause for Loew's Incorporated et al., appellees in No. 42 and appellants in No. 43. With him on the briefs was *Benjamin Melniker.*

Myles J. Lane argued the cause and filed briefs for Screen Gems, Inc., appellee in No. 42 and appellant in No. 43. With him on the briefs was *Everett A. Frohlich.*

Mervin C. Pollak argued the cause and filed briefs for C & C Super Corp., appellee in No. 42 and appellant in No. 44.

Justin M. Golenbock argued the cause for National Telefilm Associates, Inc., appellee in No. 42. With him on the brief were *Russell S. Knapp* and *Seymour Shainswit.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

These consolidated appeals present as a key question the validity under § 1 of the Sherman Act [1] of block booking of copyrighted feature motion pictures for television exhibition. We hold that the tying agreements here are illegal and in violation of the Act.

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[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 26 Stat. 209 (1890), as amended, 15 U. S. C. § 1.

The United States brought separate civil antitrust actions in the Southern District of New York in 1957 against six major distributors of pre-1948 copyrighted motion picture feature films for television exhibition, alleging that each defendant had engaged in block booking in violation of § 1 of the Sherman Act. The complaints asserted that the defendants had, in selling to television stations, conditioned the license or sale of one or more feature films upon the acceptance by the station of a package or block containing one or more unwanted or inferior films. No combination or conspiracy among the distributors was alleged; nor was any monopolization or attempt to monopolize under § 2 of the Sherman Act averred. The sole claim of illegality rested on the manner in which each defendant had marketed its product. The successful pressure applied to television station customers to accept inferior films along with desirable pictures was the gravamen of the complaint.

After a lengthy consolidated trial, the district judge filed exhaustive findings of fact, conclusions of law, and a carefully reasoned opinion, 189 F. Supp. 373, in which he found that the actions of the defendants constituted violations of § 1 of the Sherman Act. The conclusional finding of fact and law was that

> ". . . the several defendants have each, from time to time and to the extent set forth in the specific findings of fact, licensed or offered to license one or more feature films to television stations on condition that the licensee also license one or more other such feature films, and have, from time to time and to the extent set forth in the specific findings of fact, refused, expressly or impliedly, to license feature films to television stations unless one or more other such feature films were accepted by the licensee." 189 F. Supp., at 397–398.

The judge recognized that there was keen competition between the defendant distributors, and therefore rested his conclusion solely on the individual behavior of each in engaging in block booking. In reaching his decision he carefully considered the evidence relating to each of the 68 licensing agreements that the Government had contended involved block booking. He concluded that only 25 of the contracts were illegally entered into. Nine of these belonged to defendant C & C Super Corp., which had an admitted policy of insisting on block booking that it sought to justify on special grounds.

Of the others, defendant Loew's, Incorporated, had in two negotiations that resulted in licensing agreements declined to furnish stations KWTV of Oklahoma City and WBRE of Wilkes-Barre with individual film prices and had refused their requests for permission to select among the films in the groups. Loew's exacted from KWTV a contract for the entire Loew's library of 723 films, involving payments of $314,725.20. The WBRE agreement was for a block of 100 films, payments to total $15,000.

Defendant Screen Gems, Inc., was also found to have block booked two contracts, both with WTOP of Washington, D. C., one calling for a package of 26 films and payments of $20,800 and the other for 52 films and payments of $40,000. The judge accepted the testimony of station officials that they had requested the right to select films and that their requests were refused.

Associated Artists Productions, Inc., negotiated four contracts that were found to be block booked. Station WTOP was to pay $118,800 for the license of 99 pictures, which were divided into three groups of 33 films, based on differences in quality. To get "Treasure of the Sierra Madre," "Casablanca," "Johnny Belinda," "Sergeant York," and "The Man Who Came to Dinner," among others, WTOP also had to take such films as "Nancy Drew

Troubleshooter," "Tugboat Annie Sails Again," "Kid Nightingale," "Gorilla Man," and "Tear Gas Squad." A similar contract for 100 pictures, involving a license fee of $140,000, was entered into by WMAR of Baltimore. Triangle Publications, owner and operator of five stations, was refused the right to select among Associated's packages, and ultimately purchased the entire library of 754 films for a price of $2,262,000 plus 10% of gross receipts. Station WJAR of Providence, which licensed a package of 58 features for a fee of $25,230, had asked first if certain films it considered undesirable could be dropped from the offered packages and was told that the packages could not be split.

Defendant National Telefilm Associates was found to have entered into five block booked contracts. Station WMAR wanted only 10 Selznick films, but was told that it could not have them unless it also bought 24 inferior films from the "TNT" package and 12 unwanted "Fabulous 40's." It bought all of these, for a total of $62,240. Station WBRE, before buying the "Fox 52" package in its entirety for $7,358.50, requested and was refused the right to eliminate undesirable features. Station WWLP of Springfield, Massachusetts, inquired about the possibility of splitting two of the packages, was told this was not possible, and then bought a total of 59 films in two packages for $8,850. A full package contract for National's "Rocket 86" group of 86 films was entered into by KPIX of San Francisco, payments to total $232,200, after KPIX requested and was denied permission to eliminate undesirable films from the package. Station WJAR wanted to drop 10 or 12 British films from this defendant's "Champagne 58" package, was told that none could be deleted, and then bought the block for $31,000.

The judge found that defendant United Artists Corporation had in three consummated negotiations conditioned the sale of films on the purchase of an entire

package. The "Top 39" were licensed by WAAM of Baltimore for $40,000 only after receipt of a refusal to sell 13 of the 39 films in the package. Station WHTN of Huntington, West Virginia, purchased "Award 52" for $16,900 after United Artists refused to deal on any basis other than purchase of the entire 52 films. Thirty-nine films were purchased by WWLP for $5,850 after an initial inquiry about selection of titles was refused.

Since defendant C & C was found to have had an overall policy of block booking, the court did not analyze the particular circumstances of the nine negotiations which had resulted in the licensing of packages of films. C & C's policies resulted in at least one station having to take a package in which "certain of the films were unplayable since they had a foreign language sound track." 189 F. Supp., at 389.

The court entered separate final judgments against the defendants, wherein each was enjoined from

> "(A) Conditioning or tying, or attempting to condition or tie, the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license of any other film;
>
> "(B) Conditioning the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license for exhibition over any other television station of that feature film, or any other film;
>
> "(C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [*sic*] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films."

All of the defendants except National Telefilm [2] appeal from the decree. The appeals of defendants Loew's, Screen Gems, Associated Artists, and United Artists raise identical issues and are consolidated as No. 43. The appeal of defendant C & C raises additional issues, and is therefore separately numbered as No. 44. The Government, although it won on the merits below, asserts in a cross-appeal (No. 42) that the scope and specificity of the decree entered by the District Court were inadequate to prevent the continued attainment of illegal objectives. It seeks to have the decree broadened in a number of ways. All of the defendants below oppose these modifications. The cases are here on direct appeal from the District Court under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction, 368 U. S. 973, and consolidated the appeals. We shall consider No. 43 first, since appellants there raise the fundamental question whether their activities were in violation of the antitrust laws. We shall thereafter consider No. 44, the special arguments of appellant C & C, and finally No. 42, the Government's request for broadening the decree.

I.

This case raises the recurring question of whether specific tying arrangements violate § 1 of the Sherman Act.[3] This Court has recognized that "[t]ying agreements serve hardly any purpose beyond the suppression of competition," *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305–306. They are an object of anti-

[2] National Telefilm has, however, filed a brief in opposition to the Government's requests for modifications in the decree, discussed below.

[3] See *International Salt Co.* v. *United States*, 332 U. S. 392; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131; *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594; *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1.

trust concern for two reasons—they may force buyers into giving up the purchase of substitutes for the tied product, see *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 605, and they may destroy the free access of competing suppliers of the tied product to the consuming market, see *International Salt Co.* v. *United States,* 332 U. S. 392, 396. A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item. The standard of illegality is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 6. Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.[4]

The requisite economic power is presumed when the tying product is patented or copyrighted, *International Salt Co.* v. *United States,* 332 U. S. 392; *United States*

[4] Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act, it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market. This is even more obviously true when the tying product is patented or copyrighted, in which case, as appears in greater detail below, sufficiency of economic power is presumed. Appellants' reliance on *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, is therefore misplaced.

v. *Paramount Pictures, Inc.*, 334 U. S. 131. This principle grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Dev. Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661. These cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products. The patentee is protected as to his invention, but may not use his patent rights to exact tribute for other articles.

Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into antitrust law on the theory that the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences. *E. g., International Salt Co.* v. *United States*, 332 U. S. 392. In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 156–159, the principle of the patent cases was applied to copyrighted feature films which had been block booked into movie theaters. The Court reasoned that

> "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits

derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses." 334 U. S., at 158.

Appellants attempt to distinguish the *Paramount* decision in its relation to the present facts: the block booked sale of copyrighted feature films to exhibitors in a new medium—television. Not challenging the District Court's finding that they did engage in block booking, they contend that the uniqueness attributable to a copyrighted feature film, though relevant in the movie-theater context, is lost when the film is being sold for television use. Feature films, they point out, constitute less than 8% of television programming, and they assert that films are "reasonably interchangeable" with other types of programming material and with other feature films as well. Thus they argue that their behavior is not to be judged by the principle of the patent cases, as applied to copyrighted materials in *Paramount Pictures*, but by the gen-

eral principles which govern the validity of tying arrangements of nonpatented products, *e. g., Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 6, 11. They say that the Government's proof did not establish their "sufficient economic power" in the sense contemplated for nonpatented products.[5]

Appellants cannot escape the applicability of *Paramount Pictures.* A copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen.

The district judge found that each copyrighted film block booked by appellants for television use "was in itself a unique product"; that feature films "varied in theme, in artistic performance, in stars, in audience appeal, etc.," and were not fungible; and that since each defendant by reason of its copyright had a "monopolistic" position as to each tying product, "sufficient economic power" to impose an appreciable restraint on free competition in the tied product was present, as demanded by the *Northern Pacific* decision. 189 F. Supp., at 381.[6] We agree. These findings of the district judge, supported by the record, confirm the presumption of uniqueness resulting from the existence of the copyright itself.

Moreover, there can be no question in this case of the adverse effects on free competition resulting from appel-

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[5] Appellants' framing of their argument in terms of each of them not having dominance in the market for television exhibition of feature films misconceives the applicable legal standard. As noted, *supra,* p. 45, "sufficient economic power" as contemplated by the *Northern Pacific* case is a term more inclusive in scope than "market dominance."

[6] To use the trial court's apt example, forcing a television station which wants "Gone With The Wind" to take "Getting Gertie's Garter" as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one "Gone With The Wind."

lants' illegal block booking contracts. Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations. Nor can there be any question as to the substantiality of the commerce involved. The 25 contracts found to have been illegally block booked involved payments to appellants ranging from $60,800 in the case of Screen Gems to over $2,500,000 in the case of Associated Artists. A substantial portion of the licensing fees represented the cost of the inferior films which the stations were required to accept. These anti-competitive consequences are an apt illustration of the reasons underlying our recognition that the mere presence of competing substitutes for the tying product, here taking the form of other programming material as well as other feature films, is insufficient to destroy the legal, and indeed the economic, distinctiveness of the copyrighted product. *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 307; *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 611 and n. 30. By the same token, the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements.

It is therefore clear that the tying arrangements here both by their "inherent nature" and by their "effect" injuriously restrained trade. *United States* v. *American Tobacco Co.,* 221 U. S. 106, 179. Accommodation between the statutorily dispensed monopoly in the combination of contents in the patented or copyrighted product and the statutory principles of free competition demands that extension of the patent or copyright monopoly by the use of tying agreements be strictly confined. There may be rare circumstances in which the doctrine we have enunciated under § 1 of the Sherman Act prohibiting tying arrangements involving patented or copyrighted

tying products is inapplicable. However, we find it difficult to conceive of such a case, and the present case is clearly not one.

The principles underlying our *Paramount Pictures* decision have general application to tying arrangements involving copyrighted products, and govern here. Applicability of *Paramount Pictures* brings with it a meeting of the test of *Northern Pacific,* since *Paramount Pictures* is but a particularized application of the general doctrine as reaffirmed in *Northern Pacific.* Enforced block booking of films is a vice in both the motion picture and television industries, and that the sin is more serious (in dollar amount) in one than the other does not expiate the guilt for either. Appellants' block booked contracts are covered by the flat holding in *Paramount Pictures,* 334 U. S., at 159, that "a refusal to license one or more copyrights unless another copyright is accepted" is "illegal."

Appellants (other than C & C) make the additional argument that each of them was found to have entered into such a small number of illegal contracts as to make it improper to enter injunctive relief. Appellants urge that their over-all sales policies were to allow selective purchasing of films, and that in light of this, the fact that a few contracts were found to be illegal does not justify the entering of injunctive relief. We disagree. Illegality having been properly found, appellants cannot now complain that its incidence was too scattered to warrant injunctive relief. The trial judge, exercising sound judgment, has concluded that injunctive relief is necessary to prevent further violations. We think that finding wholly warranted. Moreover, the record shows that Loew's only instituted its policy of making individual films available shortly after suit was brought, and there is evidence that United Artists was conscientious in publicizing its will-

ingness to deal in individual films only after the commencement of suit was imminent. There is no reason to disturb the judge's legal conclusions and decree merely because he did not find more illegal agreements when, as here, the illegal behavior of each defendant had substantial anticompetitive effects.

II.

Appellant C & C in its separate appeal raises certain arguments which amount to an attempted business justification for its admitted block booking policy. C & C purchased the telecasting rights in some 742 films known as the "RKO Library." It did so with a bank loan for the total purchase price, and to get the bank loan it needed a guarantor, which it found in the International Latex Corporation. Latex, however, demanded and secured an agreement from C & C that films would not be sold without obtaining in return a commitment from television stations to show a minimum number of Latex spot advertisements in conjunction with the films. Thus, since stations could not feasibly telecast the minimum number of spots without buying a large number of films to spread them over, C & C by requiring the minimum number of advertisements effectively forced block booking on those stations which purchased its films. C & C contends the block booking was merely the by-product of two legitimate business motives—Latex' desire for a saturation advertising campaign, and C & C's wish to buy a large film library. However, the obvious answer to this contention is that the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives. Hence, tying arrangements, once found to exist in a con-

text of sufficient economic power, are illegal "without elaborate inquiry as to . . . the business excuse for their use," *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5.

In Nos. 43 and 44, therefore, we agree with the merits of the District Court's decision. It correctly found that the conditioning of the sale of one or more copyrighted feature films to television stations upon the purchase of one or more other films is illegal. The antitrust laws do not permit a compounding of the statutorily conferred monopoly.

III.

The trial judge's ability to formulate a decree tailored to deal with the violations existent in each case is normally superior to that of any reviewing court, due to his familiarity with testimony and exhibits. Notwithstanding our belief that primary responsibility for the decree must rest with the trial judge if workable results are to obtain, it is our duty to examine the decree in light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation. *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 89.

The United States contends that the relief afforded by the final judgments [7] is inadequate and that to be adequate it must also: (1) require the defendants to price the films individually and offer them on a picture-by-picture basis; (2) prohibit noncost-justified differentials in price between a film when sold individually and when sold as part of a package; (3) proscribe "temporary" refusals by a distributor to deal on less than a block basis while he is negotiating with a competing television station for a package sale.

[7] The operative portion of the injunctions appears at p. 43, *supra*.

Some of the practices which the Government seeks to have enjoined with its requested modifications are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461; *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 724; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409; *International Salt Co.* v. *United States,* 332 U. S. 392, 401; *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 88–89. When the Government has won the lawsuit, it is entitled to win the cause as well, *International Salt Co.* v. *United States, supra,* 332 U. S., at 401.

A. *Initial Offer of Individual Films, Individually Priced.*

Under the final judgments entered by the court, a distributor would be free to offer films in a package initially, without stating individual prices. If, however, he delayed at all in producing individual prices upon request, he would subject himself to a possible contempt sanction. The Government's first request would prevent this "first bite" possibility, forcing the offer of the films on an individual basis at the outset (but, as we view it, not precluding a simultaneous package offer, *United States* v. *Paramount Pictures, Inc., supra,* 334 U. S., at 159).

This is a necessary addition to the decrees, in view of the evidence appearing in the record. Television stations which asked for the individual prices of some of the better pictures "couldn't get any sort of a firm kind of an answer," according to one station official. He stated that they received a "certain form of equivocation, like the price for the better pictures that we wanted was so high that it wouldn't be worth our while to discuss the mat-

ter, . . . the implication being that it wouldn't happen." A Screen Gems intracompany memorandum about a Baton Rouge station's price request stated that "I told him that I would be happy to talk to him about it, figuring we could start the old round robin that worked so well in Houston & San Antonio." Without the proposed amendment to the decree, distributors might surreptitiously violate it by allowing or directing their salesmen to be reluctant to produce the individual price list on request. This subtler form of sales pressure, though not accompanied by any observable delay over time, might well result in some television stations buying the block rather than trying to talk the seller into negotiating on an individual basis. Requiring the production of the individual list on first approach will obviate this danger.

B. *Prohibition of Noncost-justified Price Differentials.*

The final judgments as entered only prohibit a price differential between a film offered individually and as part of a package which "has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." The Government contends that this provision appearing by itself is too vague and will lead to unnecessary litigation. Differentials unjustified by cost savings may already be prohibited under the decree as it now appears. Nevertheless, the addition of a specific provision to prevent such differentials will prevent uncertainty in the operation of the decree. To ensure that litigation over the scope and application of the decrees is not left until a contempt proceeding is brought, the second requested modification should be added. The Government, however, seeks to make distribution costs the only saving which can legitimately be the basis of a discount. We would not so limit the relevant cost justifications. To prevent definitional arguments, and to ensure

that all proper bases of quantity discount may be used, the modification should be worded in terms of allowing all legitimate cost justifications.

C. *Prohibition of "Temporary" Refusals to Deal.*

The Government's third request is, like the first, designed to prevent distributors from subjecting prospective purchasers to a "run-around" on the purchase of individual films. No doubt temporary refusal to sell in broken lots to one customer while negotiating to sell the entire block to another is a proper business practice, viewed *in vacuo,* but we think that if permitted here it may tend to force some stations into buying pre-set packages to forestall a competitor's getting the entire group. In recognition of this the Government seeks a blanket prohibition against all temporary refusals to deal. We agree in the main, except that the modification proposed by the Government fails to give full recognition to that part of this Court's holding in *Paramount Pictures* which said,

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted." 334 U. S., at 159.

We therefore grant the Government's request, but modify it only to the limited degree necessary to permit a seller briefly to defer licensing or selling to a customer pending the expeditious conclusion of bona fide negotiations already being conducted with a competing station on a proposal wherein the distributor has simultaneously offered to license or sell films either individually or in a package.

The modifications we have specified will bring about a greater precision in the operation of the decrees. We

have concluded that they will properly protect the interest of the Government in guarding against violations and the interest of the defendants in seeking in good faith to comply.

The judgments are vacated and the causes are remanded to the District Court for further proceedings in conformity with this opinion.

Vacated and remanded.

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with and join in Parts I and II of the Court's opinion, relating to No. 43 and No. 44, respectively. As to Part III, relating to No. 42, I dissent. My disagreement goes not so much to the particular additional relief granted, but to the fact that the Court has deemed it appropriate to concern itself at all with such comparatively trivial remedial glosses upon the District Court's decree.

I think it distorts the proper relationship of this Court to the lower federal courts, whose assessment of a particular situation is bound to be more informed than ours, for us to exercise revisory power over the terms of antitrust relief, except in instances where things have manifestly gone awry. This is not such a case, as the meticulous handling of it by the District Court abundantly shows. In my view its decree should be left undisturbed.

SOUTHERN CONSTRUCTION CO., INC., ET AL. *v.* PICKARD, DOING BUSINESS AS PICKARD ENGINEERING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 46. Argued October 16, 1962.—Decided November 5, 1962.

In the circumstances of this case, in which two different suits under the Miller Act were brought in two different District Courts by the same subcontractor against the same general contractor and its surety, based on separate projects in the two Districts, Federal Rule of Civil Procedure 13 (a) did not compel a counterclaim, which involved a payment that had not been allocated as between the projects, to be made in whichever of the two suits the first responsive pleading was filed. Its assertion in the later of the two suits, to which the general contractor, not without reason, considered it more appurtenant, did not violate Rule 13 (a). Pp. 57–61.

293 F. 2d 493, reversed in part and case remanded.

William J. Harbison argued the cause for petitioners. On the briefs were *Charles C. Trabue, Jr.* and *Harry S. McCowen.*

Edward Gallagher argued the cause and filed briefs for respondent.

PER CURIAM.

Southern Construction Company, one of the petitioners here, was the prime contractor on contracts with the United States for the rehabilitation of certain barracks at Fort Campbell, Tennessee, and Fort Benning, Georgia. There were three contracts covering the Georgia project and one covering the Tennessee project. Pursuant to the provisions of the Miller Act, 49 Stat. 793, as amended, 40 U. S. C. §§ 270a–270d, Southern furnished performance and payment bonds, with Continental Casualty Company, co-petitioner here, as surety. The plumbing and heating

subcontractor on both projects was the respondent Samuel J. Pickard, doing business as Pickard Engineering Company. Pickard's primary supplier on both projects was the Atlas Supply Company.

In December 1955, Pickard's men left the Tennessee job before it was fully completed, and shortly thereafter left the Georgia project. Atlas, Pickard's supplier, claimed that $34,520 was due it for materials furnished on the Tennessee job and $104,000 for materials furnished on the Georgia project. Following a conference in August 1956 between Southern officials and representatives of Atlas, Southern paid Atlas $35,000 in exchange for a complete release of all liability of Southern on Pickard's accounts with respect to both the Georgia and Tennessee projects.[1]

In December 1956, acting under the provisions of the Miller Act, Pickard brought suit, in the name of the United States, in the United States District Court for the Middle District of Georgia against Southern and Continental for recovery of amounts allegedly owing on both the Georgia and Tennessee jobs. In January 1957, Southern filed an answer and a counterclaim in which it alleged that Southern had paid out more than the contract price on both jobs and in which recovery of the excess was sought. The $35,000 payment to Atlas was at that time included in the counterclaim.

The Miller Act, however, requires that suits instituted under its provisions "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U. S. C. § 270b (b). Since this statute appeared to prohibit an action in the Georgia District Court on the Tennessee project, Pickard in April 1957

[1] Under the Miller Act, 40 U. S. C. § 270b, Southern as a prime contractor was secondarily liable to suppliers of the subcontractor.

filed the present action against petitioners in the United States District Court for the Middle District of Tennessee relating to the Tennessee project only, and by amendment eliminated this part of his claim from the Georgia action.

The Georgia action proceeded to trial in 1959, and according to the findings of the District Court in the present case the $35,000 payment to Atlas was "dropped" prior to trial from the counterclaim originally asserted in that action. The Georgia suit has not yet proceeded to final judgment, the Georgia District Court in September 1961 having granted Southern's motion for a new trial on its counterclaim.

In the Tennessee action here involved Southern included the $35,000 payment as part of its counterclaim for affirmative relief, and Pickard answered that the counterclaim was barred by *"res judicata."* Southern later waived any claim to affirmative relief in this action and sought only a credit of $34,520 against Pickard's contract claim on the Tennessee project. This figure was the precise amount that had been claimed by Atlas to be due it for materials supplied on this job.

The District Court, in deciding that Pickard was not entitled to any recovery, allowed this $34,520 item as a credit against Pickard's claim, but on this point the Court of Appeals for the Sixth Circuit reversed. 293 F. 2d 493. It held that since there had been no allocation of the $35,000 payment as between the Georgia and Tennessee projects the item, under Rule 13 (a) of the Federal Rules of Civil Procedure, was a "potential compulsory counterclaim" in either of the two suits; [2] that when the respon-

[2] Rule 13 (a) provides:

"(*a*) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's

sive pleading in the Georgia suit was filed the counterclaim was not the subject of any other pending action and was therefore "compulsory" in *that* suit; and, accordingly, that such counterclaim could not later be asserted in the present action. We granted certiorari to consider the applicability of Rule 13 (a) in these unusual circumstances. 368 U. S. 975.

We accept for present purposes the ruling below that the $35,000 payment had not been allocated as between the Tennessee and Georgia projects and that it therefore could have been asserted in either action. Nevertheless, we do not believe that Rule 13 (a) operates to prohibit its use in the later Tennessee action. The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim "shall" be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint. See, *e. g., United States* v. *Eastport S. S. Corp.*, 255 F. 2d 795, 801–802.

It is readily apparent that this policy has no application here. In this instance, the plaintiff-respondent, who originally sought to combine all his claims in a single suit, correctly concluded that he was required by statute to split those claims and to bring two separate actions in two different districts. The fragmentation of these claims, therefore, was compelled by federal law, and the primary defendant in both actions was thus for the first time confronted with the choice of which of the two pending suits

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claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

should be resorted to for the assertion of a counterclaim common to both. Under these circumstances, we hold that Rule 13 (a) did not compel this counterclaim to be made in whichever of the two suits the first responsive pleading was filed.[3] Its assertion in the later suit, to which Southern, not without reason, considered it more appurtenant (pp. 58–59, *supra*), by no means involved the circuity of action that Rule 13 (a) was aimed at preventing. Accordingly, the judgment of the Court of Appeals insofar as it related to this counterclaim is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[3] We are informed that after certiorari was granted in the present case, Southern filed an amended counterclaim in the Georgia action which included the $35,000 item involved here. Further proceedings in the Georgia action, however, are awaiting our decision in this case. Of course once this counterclaim has been adjudicated in one of the actions it cannot be reasserted in the other.

WETZEL *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 200. Decided November 5, 1962.

In this case, in which appellant had been convicted in an Ohio court of a state crime, had been sentenced to imprisonment and to pay the costs of prosecution, and had died while his appeal was pending, a motion to substitute the administratrix of his estate is granted and the appeal is dismissed for want of a substantial federal question.

Reported below: 173 Ohio St. 16, 179 N. E. 2d 773.

Jack G. Day for appellant.

Thomas Spellerberg for appellee.

PER CURIAM.

This is an appeal from a judgment of the Supreme Court of Ohio affirming a judgment of conviction of a criminal offense entered in the Court of Common Pleas, Wyandot County, Ohio.

The motion to substitute Margie Wetzel, Administratrix of the Estate of Edward J. Wetzel, who died April 26, 1962, as appellant in place of Edward J. Wetzel is granted. The motion of appellee to dismiss the appeal for want of a substantial federal question is granted.

MR. JUSTICE DOUGLAS, concurring.

Appellant was convicted of possessing obscene matter with intent to sell it under Ohio Statutes § 2905.34. On May 25, 1960, he was "sentenced to an indeterminate period . . . of not less than one year nor more than seven years and to pay costs of prosecution." The sentence

was suspended pending appeal in the Ohio courts. On January 17, 1962, the Supreme Court of Ohio reversed the Court of Appeals, which had reversed appellant's conviction, and on February 2, 1962, ordered the trial court's judgment executed. On the same day a warrant was issued by the trial court authorizing the sheriff to sell enough of appellant's property to satisfy costs of $469.20. This was in accordance with Revised Code § 2949.15. On February 27, 1962, the Supreme Court of Ohio suspended sentence "until further order" of that court.

Appellant died pending appeal to this Court. His wife, as administratrix, has moved to be substituted as a party.

When a convicted and fined federal criminal defendant has died pending review of his case here it has been the practice of this Court to dismiss his case and leave the disposition of his fine to the lower federal courts. See *American Tobacco Co.* v. *United States,* 328 U. S. 781, 815; *United States* v. *Johnson,* 319 U. S. 503, 520. But this practice is premised on the ground "that in the federal domain prosecutions abate . . . on the death of [a] . . . defendant." *Melrose Distillers* v. *United States,* 359 U. S. 271, 272. See *Daniel* v. *United States,* 268 F. 2d 849. But such is not the case in Ohio. There the appeal will be dismissed as moot (*Makley* v. *State,* 128 Ohio St. 571, 192 N. E. 738) but "the dismissal of an appeal, because of the death of the defendant during the pendency thereof, leaves the judgment as it was before the appeal proceeding was instituted." *State* v. *Sholiton,* 128 N. E. 2d 666, 667.

In the *Sholiton* case the court expressly refused to pass on whether decedent's estate would be liable for costs, because the issue was not presented. It is apparently the rule in Ohio, however, that costs can be collected from a deceased convicted criminal's estate. *Clark County* v.

Keifer, 16 ONPNS 41. See Ohio Jur. 2d, Costs, § 89. Under the present sentence costs seem to be a penalty which is part of the sentence. See *Hayes* v. *Pontius,* 2 Ohio Op. 453.

Thus, under existing Ohio law it appears that Wetzel's estate will have to pay a $469.20 penalty to the State of Ohio unless this Court reverses his conviction. His administratrix, and probable heir, is rightly concerned about this and is the proper party to substitute.

It is often stated that "Where no controversy remains except as to costs, this Court will not pass upon the merits." *Heitmuller* v. *Stokes,* 256 U. S. 359; see *Paper-Bag Machine Cases,* 105 U. S. 766; *Elastic Fabrics Co.* v. *Smith,* 100 U. S. 110. The genesis of these cases was *Canter* v. *American Ins. Co.,* 3 Pet. 307, wherein the Court stated:

> "As to the costs and expenses, we perceive no error in the allowance of them in the circuit court. They are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court. And, besides, it may be added, that no appeal lies from a mere decree respecting costs and expenses." *Id.,* at 319.

As stated by Chief Justice Taft, writing for the Court in *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78, 82–83:

> "There is no doubt that, as a general rule, an appeal does not lie from a decree solely for costs . . . . [This rule] is easily deducible from the discretion vested in the trial court . . . . But the rule is not absolute and should not be enforced when the trial court assumes the power to assess . . . costs . . . *not legally assessable as such.*" (Italics added.)

Those were all civil cases and this is a criminal one. Yet the rule of the civil cases should obtain here.

In this case the trial court had no discretion concerning the matter of costs. Under Ohio law costs are automatically assessed against a convicted felon. See Ohio Revised Code, §§ 2949.14, 2949.15. The costs were not "legally assessable" if the conviction was invalid.

In *Pollard* v. *United States,* 352 U. S. 354, the question was raised as to whether or not the case was moot because the petitioner had been released from prison after his petition for certiorari had been granted. *Id.,* p. 358. The issue presented was not that of guilt, but instead one that related only to the propriety or legality of the sentence imposed. We said "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." *Ibid.* Though we divided on the merits, we were unanimous on that point.

In the present case there is a strong probability of collateral consequences or "penalties or disabilities." *St. Pierre* v. *United States,* 319 U. S. 41, 43. If the conviction stands, those collateral consequences or penalties will be the likely reduction of appellant's estate through the collection of costs from it.

To support her substitution Mrs. Wetzel asserts that the deceased and his family have a substantial interest in clearing his name, that she should be allowed to protect the estate from the penalty that may be collected from it, and that the importance of the issues presented by this appeal justifies review. It is unnecessary to decide in this case whether the decedent's or his family's interest in his good name satisfies the case-or-controversy requirement. Cf. *St. Pierre* v. *United States,* 319 U. S. 41, 43. For I am convinced that under existing precedent decedent's wife and administratrix has a sufficient interest in protecting his estate from unlawful penalties to be substituted as a party and maintain this appeal.

For these reasons I believe the motion to substitute is properly granted. But on the facts of this record I have concluded that a substantial federal question is not presented.

MR. JUSTICE BLACK, while joining this opinion insofar as it deals with the motion to substitute, believes that a substantial federal question is presented and that probable jurisdiction should be noted.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissents, believing that the appeal abated upon the death of the appellant, Edward J. Wetzel. *Menken* v. *Atlanta,* 131 U. S. 405 (1889). This Court has held numerous times that the existence of a judgment taxing costs in such cases cannot alone prevent dismissal here. *Heitmuller* v. *Stokes,* 256 U. S. 359, 362 (1921); *Wingert* v. *First National Bank,* 223 U. S. 670 (1912); *Paper-Bag Machine Co.* v. *Nixon,* 105 U. S. 766, 772 (1881); *Elastic Fabrics Co.* v. *Smith,* 100 U. S. 110 (1879). Although such judgments may confer appellate jurisdiction to inquire into the lower court's power to tax costs, *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78, 82–83 (1924); *Citizens' Bank* v. *Cannon,* 164 U. S. 319, 323–324 (1896); cf. *Intertype Corp.* v. *Clark-Congress Corp.,* 249 F. 2d 626, 628 (1957), the existence of such a judgment has been held not to confer jurisdiction to inquire into the merits of the original controversy, *Smith* v. *Indiana,* 191 U. S. 138, 149 (1903); *Davis* v. *Preston,* 280 U. S. 406, 408 (1930). Accordingly, the motion to substitute the administratrix as a party should be denied, the appeal dismissed and the case remanded to the Supreme Court of Ohio for such proceedings as may be appropriate under state law.

CITIZENS UTILITIES CO. OF CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA FOR SACRAMENTO COUNTY ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT.

No. 330. Decided November 5, 1962.

Appeal dismissed for want of a substantial federal question.

Alvin H. Pelavin for appellant.

Martin McDonough for City of North Sacramento, appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BROOKSHIRE *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 351. Decided November 5, 1962.

Appeal dismissed and certiorari denied.
Reported below: 353 S. W. 2d 681.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BROOKSHIRE *v.* CONTESTIBLE, ADMINISTRATRIX.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 352. Decided November 5, 1962.

Appeal dismissed and certiorari denied.
Reported below: 355 S. W. 2d 36.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

GRISANTI *v.* CITY OF CLEVELAND ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 353. Decided November 5, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 173 Ohio St. 386, 182 N. E. 2d 568.

George J. McMonagle and *Richard E. McMonagle* for appellant.

Joseph H. Crowley, Henry J. Crawford and *John Lansdale* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

CHICAGO & EASTERN ILLINOIS RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 360. Decided November 5, 1962.

Frank F. Vesper for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al.

William J. O'Brien, Jr., Richard J. Murphy and *Robert H. Bierma* for rail carrier appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would note probable jurisdiction.

GLUCKSTERN *v.* NEW YORK.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 564, Misc. Decided November 5, 1962.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

UNITED STATES *v.* BLISS & LAUGHLIN, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 367. Decided November 5, 1962.

Judgment vacated and case remanded for reconsideration in light of *Brown Shoe Co.* v. *United States,* 370 U. S. 294.

Reported below: 202 F. Supp. 334.

Solicitor General Cox, Assistant Attorney General Loevinger and *Lionel Kestenbaum* for the United States.

W. Donald McSweeney and *Maurice Jones, Jr.* for appellee.

PER CURIAM.

The judgment is vacated and the case is remanded for reconsideration in light of *Brown Shoe Co.* v. *United States,* 370 U. S. 294.

PRESSER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 25. Argued March 22, 26, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued October 8, 1962.—Decided November 13, 1962.

Judgment affirmed by an equally divided Court.

Reported below: 292 F. 2d 171.

John G. Cardinal reargued the cause for petitioner. With him on the briefs were *Edwin Knachel* and *Robert E. Freed.*

Stephen J. Pollak reargued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

EX PARTE GEORGE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 375. Decided November 13, 1962.

Petitioner's action in peacefully picketing premises of a wholly owned and controlled subsidiary of an employer involved in a labor dispute was at least arguably protected by § 7 of the National Labor Relations Act, and a state court was without jurisdiction to enjoin such picketing or to imprison petitioner for violating its temporary injunction against such picketing. Therefore, certiorari is granted; the judgment of the Supreme Court of Texas setting aside its original writ of habeas corpus is vacated; and the cause is remanded to that Court for further proceedings not inconsistent with this opinion. Pp. 72–73.

Reported below: 163 Tex. —, 358 S. W. 2d 590.

Arthur J. Mandell for petitioner.

Tom M. Davis for respondent.

PER CURIAM.

The petition for certiorari is granted. We vacate the judgment of the Supreme Court of Texas setting aside the original writ of habeas corpus issued by it on July 10, 1961, and remand the cause to that court for further proceedings not inconsistent with this opinion.

American Oil Company was involved in a labor dispute with the National Maritime Union, which represented unlicensed crew members aboard company vessels. The union peacefully picketed a refinery operated by a subsidiary of American that had a valid collective bargaining agreement with the Oil, Chemical and Atomic Workers International Union. Upon findings that the object of the National Maritime Union's picketing of the refinery was to secure the disregard, breach or violation of the collective bargaining agreement by the refinery workers and their union, in violation of Art. 5154d, § 4,

Vernon's Tex. Rev. Civ. Stat., Ann., the subsidiary obtained a temporary injunction from the Tenth Judicial District Court of Galveston County against picketing at the refinery. The injunction in express terms bound the petitioner, an official of the National Maritime Union. Petitioner nevertheless picketed the refinery after publicly announcing his intention so to do, on the ground that he did not believe that the court had jurisdiction to issue the injunction. He was adjudged in contempt.

The only issue mooted on the habeas corpus proceeding was the jurisdiction of the District Court to issue the injunction. Under Texas law one may not be punished for contempt for violating a temporary injunction, as here, granted by a court having no jurisdiction of the subject matter. *Ex parte Twedell,* 158 Tex. 214, 309 S. W. 2d 834; *Ex parte Dilley,* 160 Tex. 522, 334 S. W. 2d 425. The District Court was without jurisdiction if petitioner's picketing was arguably prohibited or arguably protected by the National Labor Relations Act. "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 246. The Texas Supreme Court held that petitioner's conduct was neither arguably prohibited nor arguably protected by the Act. 163 Tex. —, 358 S. W. 2d 590. We disagree. Even assuming, without deciding, that the picketing would not fall within the prohibitions of § 8 (b)(1)(A) or § 8 (b)(4)(i)(B) of the National Labor Relations Act, as amended, we hold, in light of the District Court's finding that American wholly owns the subsidiary and "directs and controls all of . . . [its] activities," that petitioner's picketing was conduct at least arguably protected by § 7 of the Act.

Vacated and remanded.

LANZA ET AL. *v.* WAGNER, MAYOR OF NEW YORK CITY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 452. Decided November 13, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 N. Y. 2d 317, 183 N. E. 2d 670.

Vito F. Lanza, pro se, and *Samuel Shapiro* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Irving Galt,* Assistant Solicitor General, *Sheldon Raab,* Deputy Assistant Attorney General, *Leo A. Larkin* and *Seymour B. Quel* for appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

Syllabus.

UNITED STATES *v.* SAMPSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 69. Argued October 18, 1962.—Decided November 19, 1962.

Appellees were indicted in a Federal District Court for using the mails to defraud and conspiring to do so, in violation of 18 U. S. C. §§ 1341 and 371. The indictment alleged that, after appellees' salesmen had fraudulently represented that appellees would help businessmen to obtain loans or sell their businesses and had obtained applications for such services and advance payments therefor, appellees mailed acceptances of such applications to the victims, in order to lull them into believing that the services would be performed. The District Court dismissed the indictment on the ground that, since the money had already been obtained before the acceptances were mailed, these mailings could not have been "for the purpose of executing" the fraudulent scheme, within the meaning of § 1341. *Held:* The judgment is reversed. Pp. 76–81.

(a) This case is properly in this Court on direct appeal by the Government under 18 U. S. C. § 3731. P. 76.

(b) It cannot be held that such a deliberate and planned use of the mails by defendants engaged in a fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found by a jury under proper instructions to be "for the purpose of executing" a fraudulent scheme, within the meaning of § 1341, and the District Court erred in dismissing the substantive counts. *Kann* v. *United States,* 323 U. S. 88, and *Parr* v. *United States,* 363 U. S. 370, distinguished. Pp. 76–81.

(c) Since the conspiracy count on its face properly charged a separate offense against each of the defendants, its dismissal also was error. P. 81.

Reversed.

Howard P. Willens argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Louis F. Claiborne* and *Philip R. Monahan.*

Randolph W. Thrower argued the cause for appellees. With him on the briefs was *D. R. Cumming, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellees were indicted in a United States District Court on charges that they had used the mails "for the purpose of executing" a fraudulent scheme in violation of 18 U. S. C. § 1341 [1] and that they had conspired to so use the mails.[2] It is clear that the allegations, if proved, would show that a fraudulent scheme existed and that the mailings charged in fact occurred. The District Court dismissed 34 of the counts, however, on the ground that the facts alleged showed that the mails were not used "for the purpose of executing" the alleged scheme, as required by the statute. The court also dismissed the conspiracy count without giving additional reasons. The case is properly here on direct appeal by the Government under 18 U. S. C. § 3731. The only question we must decide with reference to the 34 substantive counts is whether the allegations in the indictment were sufficient to permit a jury to find that the mails were used "for the purpose of executing" the fraudulent scheme. Whether the indictment sufficiently charges that the mails were so used depends upon its allegations.

In brief summary, these allegations are:

The individual defendants were officers, directors, and employees of a large, nationwide corporation, also a

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[1] "SEC. 1341. *Frauds and swindles.*

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[2] 18 U. S. C. § 371.

defendant, with regional offices in various States. The defendants purported to be able to help businessmen obtain loans or sell out their businesses. Although lavish promises were freely given, the defendants did not intend to and in fact did not make any substantial efforts to perform these promised services. As a part of this scheme, the defendants secured salesmen who were trained to deceive those with whom they dealt by innuendos, half-truths, and false statements.[3] These defendants, according to the allegations, were not mere small-time, sporadic swindlers but rather they have deliberately planned and devised a well-integrated, long-range, and effective scheme for the use of propaganda, salesmen, and other techniques to soften up and then cheat their victims one by one. Under the plan, personal calls were made upon prospects who were urged by false and fraudulent representations to sign applications asking defendants to help them obtain loans or sell their businesses. The salesmen further urged prospects, many times successfully, to give a check for an "advance fee," all being assured that if their applications were not accepted at the regional office the "advance fee" would be refunded. Payments of the fees were promptly converted by the salesmen into cashiers' checks on local

[3] "It was a further part of the said scheme and artifice to defraud that the defendants would secure salesmen . . . who would be agreeable to the use of unethical sales talks and hire and use them as field representatives, and it was a further part of the scheme to teach such salesmen that prospective victims were at a complete disadvantage and would jump and act like puppets if the salesman handled the client right, and to teach them to try and impress upon the victims that said salesman was an expert; to teach salesmen to try and confuse victims and to lead them into believing that LSC was a lending company . . . and to teach said salesmen that LSC and the defendants did not care how such salesmen sold a contract to a victim and that it was perfectly all right for a salesman to use innuendos and half-truths . . . ." Record, pp. 4–5.

banks and then forwarded with the applications to the corporate regional offices where all applications, as a part of the plan, were accepted if signed and accompanied by a check for the right amount. The fees were immediately deposited in the defendants' bank account. Although the money had already been obtained, the plan still called for a mailing of the accepted application together with a form letter to the victims "for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform." [4] It was further a part of the scheme to compile rudimentary financial data and forward it to various lending agencies and to inform the victims of this fact in an attempt to convince them that they had not been defrauded and that the defendants were performing meaningful services on their behalves. Moreover, under the plan defendants, while refusing to refund the fee, pretended to investigate complaints from their victims and encouraged their salesmen to deny having made false representations, all the time seeking by false and fraudulent statements to make the victims believe that the defendants had faithfully performed and would continue to perform the promised services. In short, the indictment alleged that the scheme, as originally planned by the defendants and as actually carried out, included fraudulent activities both before and after the victims had actually given over their money to the defendants. Of course, none of these charges have been established by evidence, but at this stage of the proceed-

[4] Record, p. 8. It was also charged that a further purpose of the mailing was to inform the victims that they could not obtain a refund of their fees, that the contract was not cancellable, and that the victim had no recourse for retrieving his money. *Ibid.*

ings the indictment must be tested by its sufficiency to charge an offense.

The use of the mails relied on in the 34 dismissed counts was the mailing by the defendants of their acceptances of the victims' applications for their services. As conceded by the Government, prior to each mailing of an acceptance to a victim the defendants had obtained all the money they expected to get from that victim. The district judge's reason for holding that these counts did not charge a federal offense was that, since the money had already been obtained by the defendants before the acceptances were mailed, these mailings could not have been "for the purpose of executing" the scheme. For this holding the court relied chiefly on *Kann* v. *United States,* 323 U. S. 88 (1944), and *Parr* v. *United States,* 363 U. S. 370 (1960).

In *Kann,* the defendants defrauded their corporate employer in matters confined to their local region. As a part of their scheme, the defendants had fraudulently obtained checks payable to them which were cashed or deposited at a bank. The use of the mails charged as a violation of the federal statute was the mailing of the checks for collection by the banks which cashed them to the banks upon which they were drawn. Prior to that mailing, the Court found, the defendants had obtained the money they sought, and as far as they were concerned their plan had reached its fruition and come to a complete rest. The scheme, as the Court viewed it, had contemplated no more. The mailing was done by outsiders, the banks, which had no connection whatsoever with the fraud. The checks were mailed for the banks' own purposes and not in any way for the furthering of the fraudulent scheme. In the Court's view it was immaterial to the consummation of the defendants' scheme how or whether the banks which had cashed the checks sought to collect them.

In *Parr*, the second case upon which the District Court relied, the defendants had obtained gasoline and other products and services for themselves by the use of the credit card of a School District which had authorized the defendants to use the card for the District's purposes only. The mailings complained of in the *Parr* case were two invoices sent by the oil company to the District and the District's check mailed back in payment. Again the Court was able to find that the mailings by the outsiders were not an integral part of the scheme as planned and executed by the defendants and that, as a matter of fact, it was completely immaterial to them what the oil company did about collecting its bill.

We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be "for the purpose of executing" the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes.[5]

Moreover, as pointed out above, the indictment in this case alleged that the defendants' scheme contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before and after the money was obtained from the victims. The indictment specifically alleged that the signed copies of

[5] See, *e. g.*, *United States* v. *Lowe*, 115 F. 2d 596 (C. A. 7th Cir. 1940), cert. denied, 311 U. S. 717 (1941); *United States* v. *Riedel*, 126 F. 2d 81 (C. A. 7th Cir. 1942); *Clark* v. *United States*, 93 U. S. App. D. C. 61, 208 F. 2d 840, cert. denied, 346 U. S. 865 (1953).

the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. We cannot hold that such a deliberate and planned use of the United States mails by defendants engaged in a nationwide, fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found by a jury under proper instructions to be "for the purpose of executing" a scheme within the meaning of the mail fraud statute. For these reasons, we hold that it was error for the District Court to dismiss these 34 substantive counts.

At the time the trial court dismissed the substantive counts it also dismissed the conspiracy count without stating additional reasons. In this Court, however, it is contended that the conspiracy count duplicates the 43 substantive counts because each substantive count is in reality a conspiracy count. On this basis, it is argued that there is an unjustified pyramiding of conspiracy counts which could be used by the Government in such a way as to deny the defendants, in particular the salesmen, a fair trial. We cannot anticipate arguments that would be more appropriately addressed to the trial court should the conduct or the result of the trial deny any of the defendants their rights. Since the conspiracy count on its face, like the substantive counts on their faces, properly charges a separate offense against each of the defendants, it was also error to dismiss the conspiracy count.

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I think that today the Court materially qualifies *Parr* v. *United States,* 363 U. S. 370. There, in the face of the jury's verdict, we held that a check on a third party's

funds, mailed to pay for property after the property had been fraudulently "obtained," could not be "for the purpose of executing" a scheme to obtain the property. As the statute makes clear,[1] there is only one foundation for prosecution under the statute and that is using the mails "for the purpose of executing" the various schemes described in the Act. So far as is relevant here, those schemes are either to defraud or to obtain money by false or fraudulent representations.

It is possible that in this case indictments could be drawn which charge the use of mails *to lull existing victims* into a feeling of security so that a scheme to obtain money *from other victims* could be successfully consummated. The opinion does not so construe the indictment but concludes, as I read it, that the mere lulling of existing victims into a sense of security is enough.[2] If that is enough, then in the *Parr* case it would seem that we should have sustained the conviction because the defendants there may well have wanted the third party to pay for the property that had been fraudulently obtained so that they would not be apprehended. In the *Parr* case, as here, there was "a continuing course of conduct" (to borrow a phrase from the dissent, 363 U. S., at 402) not only to obtain money fraudulently but also to conceal the fraud so that future peculations might be possible. In *Parr*, future peculations from the same taxpayers were part of the scheme. Here there is no suggestion that those pre-

[1] "Whoever, having devised . . . [a] *scheme . . . to defraud*, or *for obtaining money* . . . by means of false or fraudulent . . . representations, or promises, . . . *for the purpose of executing such scheme* . . . places in any post office . . . any matter . . . to be sent . . . by the Post Office Department . . . shall be [guilty of a crime] . . . ." (Italics added.) 18 U. S. C. § 1341.

[2] The indictment, as I read it, charges on this phase only "lulling said victims" into a sense of security.

viously defrauded were to be defrauded a second time.[3] The mails were used only to tranquilize those already defrauded. Or at least that is the only way I can read this indictment. It is therefore a much weaker case than *Parr*.

We should not struggle to uphold poorly drawn counts. To do so only encourages more federal prosecution in fields that are essentially local.

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[3] The Solicitor General states in his brief:

"The government conceded that, after obtaining the advance fee, the defendants had no intention of earning the balance due on the service contracts. No further payments were expected to be got from the victim."

HEWITT-ROBINS INCORPORATED *v.* EASTERN FREIGHT-WAYS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 37. Argued October 11, 1962.—Decided November 19, 1962.

Petitioner brought a common law action in a Federal District Court against respondent, a common carrier by motor vehicle, to recover the difference between charges made by respondent at its established interstate rate and lower charges established by its intrastate rate on shipments from Buffalo, N. Y., to New York City. Petitioner alleged that it made the shipments without specifying the routes and that respondent violated its duty by shipping the goods over its established interstate route at its higher rate rather than over its established intrastate route at its lower rate. The Interstate Commerce Commission found that the practice was unreasonable. *Held:* The complaint stated a cause of action upon which relief could be granted, and such right of action was saved by § 216 (j) of the Motor Carrier Act. *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464, distinguished. Pp. 84–89.

293 F. 2d 205, reversed.

Harry Teichner argued the cause and filed briefs for petitioner.

Wilfred R. Caron argued the cause for respondent. With him on the briefs was *Milton D. Goldman.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an action by a shipper to recover from a motor carrier the difference in rate charges resulting from a practice of the latter of carrying unrouted intrastate shipments on its interstate routes at higher rates than those applicable to its available intrastate routes. The District Court for the Southern District of New York stayed the action awaiting a finding by the Interstate Commerce Commis-

sion as to the reasonableness of the practice. The Commission found it unreasonable* under the Motor Carrier Act, 49 U. S. C. §§ 301–327, and subsequently the District Court dismissed the complaint on the ground that the Act neither provided any reparation remedy nor preserved one at common law. 187 F. Supp. 722. The Court of Appeals, one judge dissenting, affirmed on the same grounds. 293 F. 2d 205. Each court bottomed its decision upon *T. I. M. E. Inc.* v. *United States,* 359 U. S. 464 (1959). Having some doubts as to the appositeness of that case and because of the importance of the question in the administration of the Act, we granted certiorari. 368 U. S. 951. We have concluded that *T. I. M. E. Inc., supra,* does not control the issue here and therefore reverse the judgments.

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*302 I. C. C. 173. Respondent brought an action against the United States and the Commission in the District Court for the District of New Jersey, seeking to set aside the report and the cease-and-desist order entered by the Commission. After the complaint was filed the Commission amended its disposition by striking out the cease-and-desist order, leaving only its declaratory findings as to past practices. The three-judge court, relying upon our decision in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426 (1949), held that as a three-judge court it had no authority to adjudicate the controversy since no order was under attack. 170 F. Supp. 848. Decision in the action is now held in abeyance by a single judge pending disposition of this litigation. Thus the litigation has been bifurcated into two District Courts, whose further proceedings may yet be separately appealable. This might have been avoided had the District Court for the Southern District of New York followed this Court's admonition that "the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern," *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U. S. 481, 498 (1958), rather than relying upon the shipper to file an adversary proceeding with the Commission.

The petitioner alleges that between January 1, 1953, and February 1, 1955, it delivered numerous shipments of foam rubber pads to respondent, a common carrier by motor vehicle, for transportation from Buffalo, N. Y., to New York City. It claims that while the shipments were tendered without specifying the routes of shipment the respondent, contrary to its duty as a common carrier, shipped the pads over its interstate route at the higher tariff that it had on file with the Interstate Commerce Commission rather than over its intrastate route at the lower tariff that it had on file with the Public Service Commission of New York. Excess charges in the sum of $10,000 have been collected by respondent for which petitioner prays judgment.

The sole issue before us is whether the complaint states a cause of action upon which the District Court may grant relief. The gist of the action as alleged is that the shipper had the common-law right and the carrier owed it the duty to ship the pads over the cheapest available route, no adequate justification for not so doing being shown. Nevertheless, petitioner says, the carrier in derogation of this responsibility transported the pads at the higher rate and subjected the shipper to the $10,000 damage.

No attack is made upon either of the carrier's published tariffs—both are admittedly reasonable. The controversy hinges entirely upon whether the carrier violated its duty to the shipper in selecting the interstate route and the accompanying higher rate which subjected the shipper to the loss, *i. e.*, the difference between the two lawful rates. We believe that the complaint stated a justiciable cause of action. The issue here is a far cry from that in *T. I. M. E. Inc.* v. *United States, supra.* There the question, as stated by the Court, was, "Can a shipper of goods by a certificated motor carrier challenge

in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" 359 U. S. 464, 465. The Court determined that such an attack was foreclosed by the "saving clause" of the Act, § 216 (j), 49 U. S. C. § 316 (j), as being inconsistent with the statutory scheme of regulation. We emphasized the built-in protections given shippers against unreasonable rates, at pp. 478–480, citing the 30-day-notice provision of the Act, § 217 (c), as well as the power granted the Commission under § 216 (g) to suspend rates for seven months. The Court concluded that those remedies amply protected the shipper and that the allowance of a judicial remedy would result in undercutting the stability of the rate structure which the statutory procedures sought to insure.

Here the challenge is directed not at the "reasonableness" of the rates but at the carrier's misrouting practice. The question, therefore, is not one of rates but of routes. The determination of rail carriers' routing practices has long been within the primary jurisdiction of the Commission. *Northern Pacific R. Co.* v. *Solum,* 247 U. S. 477 (1918). This jurisdiction is the more important in the case of motor carrier routing where alternative routes are greater in both number and variety. Furthermore, selection of the route is usually made on an *ad hoc* basis, precluding preshipment determination of its reasonableness. Unlike rate making there is no statutory procedure by which routing practices may be challenged in advance of shipment. Nor is the shipper by truck accorded even the right given the shipper by rail, under 49 U. S. C. § 15 (8), to select and request a particular route of the carrier. In view of these weighty statutory differences between rate making and routing practices the survival of a damage claim for misrouting appears entirely consistent with the Act. It, therefore, meets the *proviso* of the "saving clause" as well as the teaching of *T. I. M. E. Inc.*

This conclusion is buttressed by the fact that the allowance here of a damage action nowise hampers the efficient administration of the Act, unlike the allowance of such an action as to unreasonable rates. A misrouting claim does not jeopardize the stability of tariffs or of certificated routes, the sole issue being whether the carrier routed the shipment over the cheapest available route, or made a showing of adequate justification for not doing so. Moreover, the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize "cease and desist" proceedings before the Commission. Finally, and not to be overlooked, the absence of any judicial remedy places the shipper entirely at the mercy of the carrier, contrary to the overriding purpose of the Act. The allowance of such actions would, on the contrary, give neither an unfair advantage.

Those who contend that no judicial remedy is available place much weight on the fact that, as we have said, the Interstate Commerce Commission has primary jurisdiction in routing practices. We put no significance in whether one tags the claim as "overcharges" as Commissioner Eastman apparently did in his testimony before the Senate, see *T. I. M. E. Inc., supra,* at 477–478, n. 18, or whether it is a proceeding involving the "reasonableness" of routing practices. In either case the problem is one originally within the jurisdiction of the Commission. To say, however, that such primary jurisdiction compels the conclusion that the courts are without power to award damages in every instance where the Commission may not award reparations by no means follows. Indeed, the doctrine of primary jurisdiction is designed to apply "where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues . . . placed within the special competence of an

administrative body . . . ." *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64 (1956); see Davis, Administrative Law Treatise, § 19.01 (1958). The practice of the Commission in making such determination in the first instance, even though it has no power to award reparations in a given case, has long been exercised, *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 343 (1944), and is supported by a long line of cases. See *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946), and cases there cited. Be this as it may, the survival of a judicial remedy under the saving clause of § 216 (j) cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. According to § 216 (j), if the remedy is inconsistent with that scheme it does not survive. In *T. I. M. E. Inc.*, we found inconsistencies and hence no judicial remedy survived. Here, as we have indicated, rather than running interference against the Act the exercise of the judicial remedy supports its overall purposes and is nowise inconsistent with the congressional scheme embodied within its four corners. The remedy, therefore, survives and the judgment is

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

With deference, I consider that the *T. I. M. E.* case, 359 U. S. 464, plainly controls this one. That it does control is not and could hardly be gainsaid to the extent that the complaint purports to allege a statutory cause of action, that is, one based on the terms of the Motor Carrier Act itself. *T. I. M. E.*, at 468–472. However, con-

struing the complaint as alleging also a common-law cause of action, the Court holds that such an action is "not inconsistent" with the Motor Carrier Act and is therefore preserved by § 216 (j) of the statute.

The Court's decision rests primarily on the significance it accords to the existence of certain administrative procedures available to shippers to challenge *rates* in advance of their application, see §§ 216 (g) and 217 (c) of the Act, and the lack of such protective remedies in the case of *routing* practices. In addition, three further considerations are asserted to support its conclusion: (1) a misrouting claim does not jeopardize the stability of tariffs or of certificated routes, whereas to permit actions attacking the reasonableness of rates would hamper the efficient administration of the Act; (2) the allowance of misrouting actions will deter misrouting practices and decrease the number of "cease and desist" proceedings before the I. C. C.; (3) the absence of any judicial remedy would put the shipper entirely at the mercy of the carrier, contrary to the purpose of the Motor Carrier Act. This reasoning, I submit, entirely misconceives the basis of the *T. I. M. E.* decision.

The result reached in *T. I. M. E.* basically rested on two interdependent considerations: (1) the courts may not adjudicate a matter over which the Commission has been given primary jurisdiction, 359 U. S., at 473–474; (2) since the Commission must decide whether a rate is reasonable and Congress has denied it the authority to award reparations for past unreasonable charges, to allow a judicial remedy for recovery of past rate charges would "permit the I. C. C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly," *id.*, at 475.

Both of these factors are present here. There can be no doubt that under § 216 (b) and (e) of the Interstate Commerce Act the Commission has primary jurisdiction

over the complained of misrouting practices,[1] as indeed the Commission's action taken with respect to these very practices, *Hewitt-Robins, Inc.*, v. *Eastern Freight-Ways, Inc.*, 302 I. C. C. 173, and the Court's opinion in this case show. Nor is it suggested that the Commission possesses any reparations authority with respect to such misrouting. The conjunction of these factors thus brings *T. I. M. E.*, decided only four Terms ago, into full play.

1. It is true that in this instance the Act does not contain certain protective provisions as in the case of rate making. This cannot, however, serve to distinguish *T. I. M. E.*, whose determination of the congressional purpose underlying the Motor Carrier Act was based on considerations that stand quite independently of the impact of particular provisions of the statute. It should also be noted that the absence of such provisions does not mean that carriers may follow misrouting practices with impunity. Section 212 (a) of the Act provides that the Commission may, on its own initiative or on complaint, suspend or revoke certificates, permits, or licenses for willful failure to comply with any provision of the Act or any order or regulation of the Commission. Under § 216 (e) the Commission may order the termination of an unjust practice and prescribe the lawful practice to be followed. Section 222 (a) imposes fines for violations of the Act, and § 222 (b) confers jurisdiction on the District Courts to enjoin violations of the Act when application is made by the Commission.

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[1] Section 216 (b) of the Interstate Commerce Act, 49 U. S. C. § 316 (b), provides in pertinent part: "It shall be the duty of every common carrier of property by motor vehicle . . . to . . . observe . . . reasonable . . . practices . . . relating to or connected with the transportation of property in interstate . . . commerce." Section 216 (e) provides that whenever "the Commission shall be of the opinion that any . . . practice . . . is or will be unjust or unreasonable . . . it shall determine . . . the lawful . . . practice."

2. If the issue as to the reasonableness of a routing practice is referred to the Commission, a procedure the Court recognizes as essential, allowance of a judicial remedy for misrouting will not jeopardize the stability of tariffs or of certificated routes. But the suggestion that such a danger was presented by a court action challenging unreasonable rates and that this contributed to the decision in *T. I. M. E.* is manifestly untenable. It was conceded there, as of course it had to be under prior decisions of this Court,[2] that the primary jurisdiction doctrine compelled referral to the Commission of all issues as to the reasonableness of the rates. Since even if a judicial remedy were allowed the Commission would have been the tribunal deciding the basic question, the course of decision would have been uniform and there would not have been, any more than here, interference with the Commission's functioning in the area of its special competence or any threat to the stability of the rate structure. Moreover, the possibility that rate actions might constitute a threat to the rate structure through stimulating excessive litigation could hardly have been regarded as a significant factor in *T. I. M. E.*, for it was there observed that only a handful of actions to recover for unreasonable charges had been brought in the previous 24 years. 359 U. S., at 479. And if the Court now believes that to have been a relevant consideration in *T. I. M. E.*, it should certainly be of greater weight with respect to misrouting claims, which are likely to arise more frequently because, as the Court points out, "selection of the route is usually made on an *ad hoc* basis, precluding preshipment determination of its reasonableness." [3]

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[2] See, *e. g.*, *Texas & Pacific R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

[3] If the Court's reference to Commissioner Eastman's statement quoted in *T. I. M. E.*, at 477–478, n. 18, is intended to imply that

3. Finally, as to the suggestions that actions such as this should be allowed because of their incidental deterrent effect on misrouting practices and in the interest of justice to shippers, it need only be said that these are matters for the Congress.[4] Our duty is to apply the statute as we find it.

I would affirm.

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the present action may be characterized as one for rate "overcharges" and thus is permissible, it should be noted that the "overcharges" to which the Commissioner referred were, as his statement makes clear, charges "above published tariff rates," *id.*, at 478, not those resulting, as alleged here, from the application of a wrong tariff. It is only the former that the Commissioner thought could be recovered "in court as the law now stands." *Id.*, at 478.

[4] So far, Congress has refused to act. See H. R. 8031, 86th Cong., 1st Sess. (1959); 359 U. S., at 471–472 and notes 10, 11.

LOS ANGELES MEAT & PROVISION DRIVERS UNION ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 38. Argued October 10, 1962.—Decided November 19, 1962.

The Government brought this civil action against appellants, a labor union, one of its business agents and four self-employed independent contractors, so-called grease peddlers, who were members of the union, to terminate violations of § 1 of the Sherman Act. Judgment was entered upon findings based upon a detailed stipulation of facts in which appellants admitted all the allegations of the complaint and agreed to the ultimate conclusion that they had unlawfully combined and conspired in unreasonable restraint of foreign trade and commerce in yellow grease. The District Court found that only the support of the union and the powerful weapons at its command had enabled the peddlers and the union to destroy free competition in the purchase and sale of waste grease and that termination of membership of the grease peddlers in the union appeared to be the most effective, if not the only, means of preventing a recurrence of appellants' unlawful activities. It not only enjoined the practices found to be unlawful but also ordered the union to expel from membership all self-employed grease peddlers. *Held:* The judgment is sustained. Pp. 95–103.

(a) A court of equity has power to order the dissolution of an association of businessmen when the association and its members have conspired among themselves or with others to violate the antitrust laws, and the circumstances found in this case provide ample support for a decree of dissolution. Pp. 98–99.

(b) Nothing in the anti-injunction provisions of the Norris-LaGuardia Act nor in the labor exemption provisions of the Clayton Act insulates a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the antitrust laws. Pp. 99–101.

(c) Businessmen who combine in an association which otherwise would be properly subject to dissolution under the antitrust laws cannot immunize themselves from that sanction by the simple expedient of calling themselves a labor union. P. 101.

(d) There is nothing in the Norris-LaGuardia Act nor in the Clayton Act nor in the federal policy which these statutes reflect to prevent a court from dissolving the ties which bound these businessmen together and which bound them to the appellant union in the circumstances of this case. Pp. 101–103.

(e) The decree does not violate appellants' freedom of association guaranteed by the First Amendment. P. 101, n. 5.

(f) Though the decree directed the union to expel from membership "all grease peddlers" and to refuse membership in the future to "any grease peddler," it was not void as to grease peddlers who were not joined as defendants, since the order ran only against the union. P. 101, n. 5.

196 F. Supp. 12, affirmed.

Charles K. Hackler argued the cause for appellants. With him on the briefs was *David Previant.*

Robert B. Hummel argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, Stephen J. Pollak* and *Richard A. Solomon.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellants are a Los Angeles labor union, one of its business agents, and four self-employed independent contractors, so-called "grease peddlers," who were members of the union. They appeal from a judgment entered against them by a Federal District Court in a civil action brought by the United States to terminate violations of § 1 of the Sherman Act.[1] The judgment was entered upon findings based upon a detailed stipulation of facts in which the appellants admitted all the allegations of the complaint and agreed to the ultimate conclusion that they

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

had unlawfully combined and conspired in unreasonable restraint of foreign trade and commerce in yellow grease. In the stipulation the appellants also agreed to the issuance of a broad injunction against them. The District Court's decree enjoined in specific detail the practices found to be unlawful, and in addition ordered the union to terminate the union membership of all self-employed grease peddlers. 196 F. Supp. 12. The appellants attack the judgment here upon the single ground that the District Court was in error in ordering termination of the union membership of these independent businessmen.[2] Consideration of this claim requires a somewhat detailed review of the nature of the illegal conspiracy in which the appellants in this case were concededly engaged.

During the period between 1954 and 1959 there were in Los Angeles County eight firms engaged as processors in the production of yellow grease, an inedible grease produced by removing moisture and solid impurities from so-called restaurant grease—waste grease resulting from the preparation of food in restaurants, hotels and institutions. A substantial part of the yellow grease so produced was sold to overseas purchasers and to purchasers in California for prompt shipment overseas.

The processors procured restaurant grease in two separate ways. They made direct purchases, usually from large restaurants, hotels and other institutions, and in these transactions the processors picked up the restaurant grease from the sellers through employees who were members of the union. Restaurant grease from other sources was usually purchased by the processors from grease peddlers, independent entrepreneurs whose earnings as middlemen consisted of the difference between the price at which they bought the restaurant grease from various sources and the price at which they sold it to the proces-

[2] The appeal was brought directly to this Court under the provisions of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29.

sors, less the cost of operating and maintaining their trucks. There were some 35 to 45 grease peddlers in the Los Angeles area.

In 1954 most of the grease peddlers became members of the appellant union, at the instigation of the appellant business agent, for the purpose of increasing the margin between the prices they paid for grease and the prices at which they sold it to the processors. To accomplish this purpose, fixed purchase and sale prices were agreed upon and enforced by union agents through the exercise or threatened exercise of union economic power in the form of strikes and boycotts against processors who indicated any inclination to deal with grease peddlers who were not union members. The union's business agent allocated accounts and territories for both purchases and sales among the various grease peddlers, who agreed to refrain from buying from or soliciting the customers of other peddlers, and violations of this agreement could result in a grease peddler's suspension from the union, in which event he was, of course, prohibited from carrying on his business.

From 1954 to 1959 this basic plan of price fixing and allocation of business was effectively carried out by elimination of the few peddlers who had not joined the union, and by coercion upon the processors through threats of "union trouble" if they did not comply.

Within the union the grease peddlers were treated as a separate group, distinct from the some 2,400 employee members. The meetings of the grease peddlers were always held apart from regular union meetings, and from 1955 on, the grease peddlers were members of a special "subdivision" of the union—Local 626–B. The affairs of this separate subdivision were administered not by regular union officers, but by the appellant business agent who had originated the scheme, together with a committee of grease peddlers to assist in "policing, enforcing

and carrying out the program to suppress and eliminate competition."

There was no showing of any actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers and the other members of the union. It was stipulated that no processors had ever substituted peddlers for employee-drivers in acquiring restaurant grease, or had ever threatened to do so. The stipulation made clear that the peddlers and the processors had essentially different sources of supply and different classes of customers. Based on these stipulated facts, the District Court affirmatively found that "there is no competition between [the employee and peddler] groups because each is engaged in a different line of work . . . ."

Pointing out that "the stipulated facts clearly show that before the grease peddlers joined the defendant Union, there was no suppression of competition among them, and that only the support of the Union and the powerful weapons at its command enabled the peddlers and the Union together to destroy free competition in the purchase and sale of waste grease," the District Court concluded that "a decree terminating the membership of the grease peddlers in defendant Union appears to be the most effective, if not the only, means of preventing a recurrence of defendants' unlawful activities." The court further concluded that nothing in the Clayton Act or the Norris-LaGuardia Act prevented the issuance of a decree divesting the grease peddlers of union membership in the circumstances of this case. We agree with these basic conclusions.

It is beyond question that a court of equity has power in appropriate circumstances to order the dissolution of an association of businessmen, when the association and its members have conspired among themselves or with others to violate the antitrust laws. *Hartford-Empire Co.* v.

United States, 323 U. S. 386, 428. And the circumstances stipulated and found in the present case provided ample support, we think, for a decree of dissolution, as a matter of the discreet exercise of equitable power.

It is also beyond question that nothing in the anti-injunction provisions of the Norris-LaGuardia Act,[3]

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[3] Norris-LaGuardia Act, § 4, 29 U. S. C. § 104:

"104. *Enumeration of specific acts not subject to restraining orders or injunctions.*

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title." March 23, 1932, c. 90, § 4, 47 Stat. 70.

nor in the labor exemption provisions of the Clayton Act,[4] insulates a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the antitrust laws. *Allen Bradley Co.* v. *Local*

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[4] Clayton Act, §§ 6 and 20, 15 U. S. C. § 17, and 29 U. S. C. § 52:

"17. *Antitrust laws not applicable to labor organizations.*

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

"52. *Statutory restriction of injunctive relief.*

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful

Union No. 3, 325 U. S. 797. Indeed, the appellants have conceded the propriety of the order in the present case which broadly enjoins the illegal practices in which they were engaged.

The narrow question which emerges in this case, therefore, is whether businessmen who combine in an association which would otherwise be properly subject to dissolution under the antitrust laws can immunize themselves from that sanction by the simple expedient of calling themselves "Local 626–B" of a labor union.[5] We think there is nothing in the Norris-LaGuardia Act nor in the Clayton Act, nor in the federal policy which these statutes reflect, to prevent a court from dissolving the ties which bound these businessmen together, and which bound them to the appellant union, in the circumstances of the present case.

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manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

[5] The appellants also urge that the decree violates their right of freedom of association guaranteed by the First Amendment. This contention, carried to its logical conclusion, would render unconstitutional not only many of the provisions of the antitrust laws, but all general criminal conspiracy statutes as well. Such a claim was explicitly rejected in *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490.

The appellants further contend that the decree is void as to grease peddlers who were not joined as defendants. But the order of divestiture ran only against the union:

"The defendant Local 626 is ordered and directed:

"(a) To expel promptly from membership all grease peddlers;

"(b) To refuse membership at any time in the future to any grease peddler;

"(c) To expel from membership any member who becomes a grease peddler;

"(d) To furnish a copy of this decree to all grease peddlers who are now members of Local 626."

The provisions of the Norris-LaGuardia Act place severe limitations upon the issuance of an injunction by a federal court in "any case involving or growing out of any labor dispute," and the statute specifically forbids a District Court in such a case to prohibit anyone from "[b]ecoming or remaining a member of any labor organization." But, as the District Court correctly found, the present case was not one "involving or growing out of any labor dispute," but one involving an illegal combination between businessmen and a union to restrain commerce. In such a case, as *Allen Bradley Co.* clearly held, neither the Norris-LaGuardia Act nor the labor exemption provisions of the Clayton Act are applicable.

This Court's decision in *Columbia River Co.* v. *Hinton,* 315 U. S. 143, is very much in point. That was a private antitrust suit brought by a processor of fish to enjoin an allegedly illegal combination of fishermen, who had joined together in the Pacific Coast Fishermen's Union to regulate the terms under which fish would be sold. The organization was "affiliated with the C. I. O." 315 U. S., at 144. The defendants claimed that an injunction against them would violate the Norris-LaGuardia Act. The Court held that the controversy was not a "labor dispute" within the meaning of the Norris-LaGuardia Act, pointing out that that statute was "not intended to have application to disputes over the sale of commodities." 315 U. S., at 145. Here, as in *Columbia River Co.,* the grease peddlers were sellers of commodities, who became "members" of the union only for the purpose of bringing union power to bear in the successful enforcement of the illegal combination in restraint of the traffic in yellow grease.[6]

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[6] In November 1954, the grease peddlers formed a trade association known as the Los Angeles Grease Buyers Association. This association was unsuccessful in its efforts to control the market in restaurant grease, and it was dissolved in early 1955 after a meeting at which

The District Court was not in error in ordering the complete termination of that illegal combination.

What has been said is not remotely to suggest that a labor organization might not often have a legitimate interest in soliciting self-employed entrepreneurs as members. Cf. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769; *Local 24* v. *Oliver*, 358 U. S. 283. And both the Norris-LaGuardia Act and the Clayton Act ensure that the antitrust laws cannot be used as a vehicle to stifle legitimate labor union activities. But here the court found upon stipulated facts that there was no job or wage competition or economic interrelationship of any kind between the grease peddlers and other members of the appellant union. If that situation should change in the future, the District Court will have ample power to amend its decree.[7]

Affirmed.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BRENNAN joins, concurring.

I concur in today's opinion and judgment of the Court because the absence here of any countervailing union interest in retaining the grease peddlers as members coupled with the egregious nature of the conduct involved supports the District Court's exercise of discretion in imposing the contested sanction as the "most effective . . . means of preventing a recurrence of defendants' unlawful activities." *Ante*, p. 98. As I read the stipulated record, the peddlers did not act and were not viewed by the

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the appellant union business agent told the peddlers to choose between the union and the association, stating that the union could do for the peddlers what the association could not do.

[7] *United States* v. *Swift & Co.*, 286 U. S. 106, 114. Cf. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 184.

union as participants in normal union activities designed to better their economic condition, but instead were from the very beginning used by union officials to effect a concededly illegal scheme to control the distribution and processing of grease.

This does not mean, and I do not regard the opinion of the Court as saying, that members may be expelled from a union when the pursuit of genuine labor objectives has collaterally resulted in transgressions of the antitrust laws.

The relief given by the District Court is not inconsistent with these expressions. To support its order, however, that the union must terminate the membership of the grease peddlers, the court below reasoned that the expulsion was appropriate and justified because, in the absence of job or wage competition between the peddlers and other union members, the peddlers were not proper subjects of unionization. In reaching this conclusion, the court below too narrowly circumscribed the permissible area of legitimate labor union activity. To believe that labor union interests may not properly extend beyond mere direct job and wage competition is to ignore not only economic and social realities so obvious as not to need mention, but also the graphic lessons of American labor union history.

Today's opinion of the Court thus properly notes that a labor organization may "often have a legitimate interest in soliciting self-employed entrepreneurs as members" and recognizes that permissible union interest and action extends beyond job and wage competition to other "economic interrelationship[s]." *Ante*, p. 103. In my view, there is therefore implicit in this Court's opinion a rejection of the District Court's overly strict view that job or wage competition is the sole measure of the propriety of union organizational efforts.

Notwithstanding what I take to be its disapproval of the views of the district judge, the Court correctly sustains

the judgment expelling the peddlers from membership in the union, not because there is absent the job or wage competition erroneously considered crucial by the District Court, but because there does not appear in this record any other legitimate labor union interest presently being served by organization of these peddlers.

The Court is not here required to pass upon, and does not pass upon, the existence of the antitrust violation, or whether, as an original matter, the grease peddlers might properly associate among themselves or affiliate with a sympathetic and genuinely interested union to improve their economic condition. Resolution of such issues would require careful and detailed consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by §§ 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by *United States* v. *Hutcheson,* 312 U. S. 219, and, in addition, the applicability here of the doctrines enunciated by this Court in cases such as *Columbia River Packers Association, Inc.,* v. *Hinton,* 315 U. S. 143, and *Allen Bradley Co.* v. *Local No. 3,* 325 U. S. 797. In the present case, however, appellants stipulated in the District Court that they have violated the Sherman Act and engaged in a pattern of conduct calling for remedial injunctive relief; they offered no justification for their admittedly illegal conduct. These concessions necessarily forfeit any antitrust exemption which might otherwise have been claimed to attach. Consequently, the only question remaining is whether, having thus negatived by their stipulations the existence of any exonerating legitimate union interest, appellants may now complain that the district judge abused his discretion in fashioning a remedy which included, in addition to the enjoining of future similarly illegal conduct, expulsion of the peddlers from the union. Although, as I have indicated, I do not agree with all of

his views, I believe that the district judge did not exceed permissible bounds in framing the decree.

The particular nature of the challenged conduct giving rise to the ultimate illegality (whether adjudicated after contest or stipulated) is, of course, immediately and directly relevant to the nature of the relief to be decreed. Relief should be effective to preclude future violations and, at the same time, should not unduly penalize the parties. Since the conduct here goes beyond that recorded in the opinion of the Court, a brief recital of additional facts is appropriate.

The stipulated antitrust violation does not depend upon the fact of combination between the grease peddlers and the union for the purpose of bettering the economic condition of the former through limited use of collective bargaining power—an affiliation which standing alone and as an original matter might have been proper. Though not joined as defendants below, at least some of the processors purchasing grease from the peddlers were conceded to have been co-conspirators. The union business agent openly allocated sales among the processors and certain processors were completely cut off from sources of supply. On at least one occasion, processors were required to submit information concerning the volume of their grease purchases and the data supplied was used by the union as a basis for ordering an equalizing shift of business to a processor owned by a union member. Only a month earlier, the union business agent had arranged for a competitor to "help out" this same favored processor by selling for it grease which it was having trouble selling. The accommodating processor undertook the sale simply because it feared "trouble" with the union and its agent if it refused.

By virtue of the union's activities, the peddlers' sales of grease were ultimately wholly diverted from the six processors originally dealing with the peddlers to two

processors, one of which was owned by a union member and in the other of which a union member was a partner. In the course of accomplishing this shift of business, at least one noncooperative processor was forced out of business.[1]

Such facts—all of which were stipulated—demonstrate a pattern of allocation of sales among processors and other improper practices designed to benefit certain favored processors in which union members had a direct financial interest.

Moreover, as indicated in the opinion of the Court, appellants stipulated that the peddlers themselves are "independent businessmen" and not "employees" of the processors. We cannot overlook the force of these concessions. This case is unlike *Labor Board* v. *Hearst Publications,* 322 U. S. 111, in which nonemployee status was not merely unconceded, but the contrary was argued and shown. Here, the single paragraph in the stipulation of facts describing the nature of the peddlers' activities does not overcome the ultimate stipulation that they were "businessmen" and not "employees." Certainly we should not, merely by mechanically affixing naked labels imported from other contexts, decide cases on abstractions; but we cannot ignore the impact of unlimited, self-made categorizations applied by agreement in the very lawsuit before us.[2]

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[1] The union agent told the owner of the business that "if he [the agent] could learn the name of [the processor's] . . . landlord and the buyers to whom [the processor] . . . was selling yellow grease . . . he would bring pressure through the Union to have [the processor's] . . . lease cancelled and to have the buyers stop dealing with [it] . . . ." The agent said that he did not "want [the processor] . . . in the grease business."

[2] The stipulation of nonemployee status plus the absence of pursuit of any genuine labor objective negatives the existence of any "labor dispute" and eliminates the need to consider further the applicability

The import of the entire stipulated factual record is that the union neither had nor pursued any legitimate present interest in organizing the grease peddlers. Were it otherwise, that portion of the decree compelling expulsion of the peddlers from the union, in my view, could not stand. The sanction here invoked is an extreme one, and, unless confined to use but rarely and then only in the most compelling of circumstances, may become a device for unfairly and improperly fractionalizing or decimating unions.

On the circumstances presented to the Court, the judgment below is properly affirmed. The situation may change, however, and I understand the opinion of the Court to say that if a legitimate union interest in organizing the peddlers does hereafter arise, the District Court has the power, and indeed the duty, to modify the decree on application of the appellants. For these reasons, I join in the opinion of the Court.

MR. JUSTICE DOUGLAS, dissenting.

If we took here the approach we took in *Labor Board* v. *Hearst Publications*, 322 U. S. 111, we would reverse this judgment. The question there was whether "newsboys," (who were indeed mature men, *id.*, 116) whose compensation consisted of the difference between the price at which they bought their papers from the publisher and the price at which they sold them, were "employees" for purposes of the National Labor Relations Act. Though

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of the Norris-LaGuardia Act prohibitions on specified injunctive relief. There is involved neither an extension of *Allen Bradley Co.* v. *Local No. 3*, 325 U. S. 797, nor a narrowing of the application of Norris-LaGuardia. Similarly obviated is the related question whether the substantive antitrust exemption read into the Norris-LaGuardia Act by *United States* v. *Hutcheson*, 312 U. S. 219, is coextensive with the Act's injunctive inhibitions, so that appellants' waiver of the former with respect to the activities and combination here challenged, see p. 105, *supra*, is also effective to waive the latter.

by common-law standards they were "independent contractors," we held that they were "employees" under the Federal Act. We noted that numerous types of "independent contractors" had formed or joined unions for collective bargaining—musicians, actors, writers, artists, architects, engineers, and insurance agents. *Id.*, 127, n. 26. We pointed out that there were marginal groups who, though entrepreneurial in form, lacked the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions. *Id.*, 126–128. We emphasized that "the economic facts of the relation" (*id.*, 128) may make it "more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation." *Ibid.*

We know from our own cases (which are much closer on their facts to the present controversy than is *Columbia River Co.* v. *Hinton*, 315 U. S. 143) that the owner-driver-peddler system in the transportation and service trades has led to wage and job competition and to strife of one kind or another. *Senn* v. *Tile Layers Union*, 301 U. S. 468, sustained picketing of a tile contractor who did much of the manual labor himself but also hired a few non-union helpers. In *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, a conflict arose between a union and small peddlers of baked goods who had increased ranks as a result of social security and unemployment compensation laws. *Id.*, 770. We sustained under the First Amendment the union's picketing of the peddlers. See also *Local 24* v. *Oliver*, 358 U. S. 283.

Drivers' Union v. *Lake Valley Co.*, 311 U. S. 91, is even more in point for it presented, as does the present case, a question under the Norris-LaGuardia Act. Small milk peddlers who bought from wholesalers and sold to retailers grew so fast that union dairy employees lost their jobs and retailers started cutting prices. The result was a

weakening of the union position. Picketing started and an injunction against it issued. We held that there was a "labor dispute" within the meaning of the Norris-LaGuardia Act and therefore that the federal courts had no power to issue an injunction. Cf. *United States* v. *American Federation of Musicians,* 318 U. S. 741.

It was stipulated in the present case that "Grease peddlers are independent businessmen who are engaged in the business of buying, transporting, and selling restaurant grease for their own account. They are not employees of the grease processors."

This is the beginning not the end of the problem. And it is no answer to say, as did the District Court, that union members and these grease peddlers do not compete. That is, indeed, denied by the record *which shows that union members drive trucks for grease producers and pick up and transport grease.*

The record in *American Trucking Assns.* v. *United States,* 344 U. S. 298, 304–306, makes clear that marginal owner-drivers can demoralize large segments of the transportation industry. Moreover, the stark fact is that here, as in the "newsboys" case, the union's effort was to improve the economic status of the grease peddlers. This is made clear by the stipulated facts:

> "These self-employed peddlers have no established places of business; no employees, except an occasional loader; no capital investment except a small equity in a truck; no skill or special qualifications except the ability to load, unload and drive a truck. . . . Their earnings represent the difference between the buy and sell price of the waste grease . . . ."

When the level of prices paid to peddlers by processors dropped in 1952–1954 to less than half of the previous price, the income of peddlers was substantially reduced.

This led to intensive competition between peddlers. As a result, the unionization program was designed to increase the profits of the grease peddlers by allocating routes and customers between them and by increasing the margin between the price paid by the peddlers and the price they would receive.

The Court said many years before this age of enlightenment that unions were rightfully concerned with "the standard of wages of their trade in the neighborhood." *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. This fact underlies the present controversy. All who haul grease, whether "employees" or "peddlers," are in the same boat. Protection of one protects all. The union plainly has a legitimate interest in the conditions in the industry which increase or reduce employment opportunities or increase or reduce labor's rewards.* The

*"The small owner-operator or 'gypsy' needs only enough capital to make a down payment on a truck and is free to offer his services at whatever rates he may be willing to accept. In order to protect his equity in his truck he tends, under competitive pressures, to progressively lower his rates until he is taking a bare subsistence for his own wages and is providing inadequate reserves for repairs, maintenance, or replacement. He works long hours, attempts to do his own repair work, often disregards health and safety requirements and load restrictions. He is difficult to organize into trade associations for purposes of self-regulation of rates and standards; and he is likewise difficult to organize into a trade union. He often loses his truck through inability to maintain payments; or when it wears out he has no funds accumulated for another. But there are always new hopefuls to replace him, especially in a period of considerable unemployment (as in the thirties), when an attempt to create self-employment appears to be the only alternative to no employment whatever. Unless regulated in some manner, the small owner-operator constitutes a menace to employment conditions, standards, and in fact to the stability of the entire industry." Gillingham, The Teamsters Union on the West Coast, Institute of Industrial Relations, U. of Calif. (1956), pp. 35–36.

fact that illegal acts were committed does not alter the fact that at heart we have here a "labor dispute" within the meaning of the Norris-LaGuardia Act. That definition is broad and includes "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment." 29 U. S. C. § 113 (c). To the extent that the stipulations in this case tend to preclude the conclusion that there was a "labor dispute" those stipulations should not control. For other stipulations of fact compel the contrary conclusion, which is essentially a legal question. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39. "We are not bound to accept, as controlling, stipulations as to questions of law." *Id.,* 51.

The fact that acts were committed which overstepped the bounds set by the interlacing Sherman, Clayton and Norris-LaGuardia Acts means that the full array of antitrust remedies can be brought against the grease peddlers, insofar as they combined with processors, a nonlabor group. See *Allen Bradley Co.* v. *Local Union,* 325 U. S. 797, 812. Yet that does not mean that they can be expelled from the union. Since there was a "labor dispute" within the meaning of the Norris-LaGuardia Act, federal courts have no power to compel the grease peddlers to resign as members of the union. For that Act expressly bars a federal court from enjoining anyone from "Becoming or remaining a member of any labor organization." 29 U. S. C. § 104 (b).

The fact that the grease peddlers may have committed federal offenses or otherwise shown themselves to be lawless, not law-abiding, in no way qualifies the absolute command of the Norris-LaGuardia Act. Indeed, we held in *Allen Bradley Co.* v. *Local Union, supra,* 812, that a

union that combines with business interests to violate the antitrust laws could be enjoined only as respects "those prohibited activities." Otherwise we said the injunction would run "directly counter" to the Norris-LaGuardia Act. *Id.*, 812. When we sanction the addition of the penalty of expulsion from union membership, we qualify the *Allen Bradley* decision.

VITORATOS *v.* WALSH, MUNICIPAL COURT CLERK.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 507, Misc. Decided November 19, 1962.

Appeal dismissed and certiorari denied.
Reported below: 173 Ohio St. 467, 183 N. E. 2d 917

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

LA ROSE *v.* TAHASH, WARDEN.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 445, Misc. Decided November 19, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 262 Minn. 552, 115 N. W. 2d 687.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

GILBERTVILLE TRUCKING CO., INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 40. Argued October 15, 1962.—Decided December 3, 1962.

Appellants, two incorporated common carriers by motor vehicle and their stockholders, applied to the Interstate Commerce Commission under § 5 (2) of the Interstate Commerce Act for approval of a merger of the two corporations. Acting under § 5 (7), the Commission initiated an investigation into the possibility of a violation of § 5 (4), and the two proceedings were consolidated. After hearings and further proceedings, the Commission found that informal *de facto* management and control of the two corporations in a common interest had been unlawfully effectuated in violation of § 5 (4); it denied approval of the merger; ordered the violation terminated; and ordered one of the individual appellants to divest himself of his stock in one of the corporations. A suit by appellants to enjoin and set aside the Commission's orders was dismissed by the District Court, on the ground that the orders were reasonable and supported by substantial evidence. *Held:* The order denying approval of the merger is affirmed; but the judgment is reversed in part, and the case is remanded for further proceedings. Pp. 116–131.

(a) On the record in this case, the Commission was justified in concluding that the two appellant common carriers by motor vehicle were in fact being managed and controlled in a common interest. Pp. 117–122.

(b) Section 5 (4) is not limited to the proscription of holding companies and other corporate devices; it applies to the accomplishment or effectuation of control or management in a common interest of two or more carriers, "however such result is attained"; and the Commission's conclusion that the informal *de facto* relationships found to exist in this case resulted in control or management of the two corporations in a common interest which violated § 5 (4) is sustained. Pp. 122–126.

(c) The Commission did not act arbitrarily in denying approval of the proposed merger because of the violation of § 5 (4), and its order denying such approval is affirmed. Pp. 127–129.

(d) Since the record contains no evidence that the parties were heard on the issue of divestiture or that proper standards were applied in determining that it was the appropriate remedy for the violation of § 5 (4) found to exist in this case, the judgment of the District Court is reversed in part, and the case is remanded for further proceedings. Pp. 129–131.

196 F. Supp. 351, affirmed in part and reversed in part.

Loyd M. Starrett, by special leave of Court, *pro hac vice*, argued the cause for appellants. With him on the briefs was *Henry E. Foley*.

Lionel Kestenbaum argued the cause for the United States et al. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, Robert W. Ginnane* and *James Y. Piper*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case concerns disapproval by the Interstate Commerce Commission of a proposed merger on the ground that "control and management in a common interest" over the two applicant-carriers had been unlawfully effectuated prior to the merger application in violation of § 5 (4) of the Interstate Commerce Act, as amended, 54 Stat. 907, 49 U. S. C. § 5 (4).[1]

The applicant-carriers are L. Nelson & Sons Transportation Co. and Gilbertville Trucking Co., both of whom are certificated by the Commission as common carrier motor carriers. The principal stockholders of Nelson Co. are two half brothers, Charles Chilberg and Clifford Nelson; Gilbertville Co. is wholly owned by a third brother, Kenneth Nelson.

The merger application was filed October 6, 1955, by the two carriers and their stockholders pursuant to § 5 (2) of

[1] The Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, is hereinafter referred to as "the Act" or by the section number alone.

the Act. Two and a half months later the Commission initiated an investigation into the possibility of a § 5 (4) violation pursuant to authority granted by § 5 (7) of the Act. The two proceedings were consolidated for hearing. The trial examiner determined that § 5 (4) was being violated, but recommended that the merger be approved on the ground that the violation was neither intentional nor flagrant. Division 4 affirmed the finding of a violation, but disapproved the merger, and ordered the violation terminated. 75 M. C. C. 45. On reconsideration, the full Commission affirmed the Division, but further ordered that Kenneth Nelson divest himself of Gilbertville Co. 80 M. C. C. 257. A suit before a three-judge United States District Court for the District of Massachusetts to enjoin and set aside the Commission's orders was dismissed on the ground that the orders were reasonable and supported by substantial evidence. 196 F. Supp. 351. An appeal was taken to this Court contesting (1) the finding of a § 5 (4) violation, (2) the denial of the merger, and (3) the order of divestiture. We noted probable jurisdiction. 368 U. S. 983.

The factual issue in this case turns upon the development of family, management, and operational relationships between Nelson, Gilbertville, and a third carrier, R. A. Byrnes, Inc., which is owned by the principal stockholders of Nelson.

The Nelson transportation business was first organized in 1930 as a partnership. In 1947 it was incorporated as L. Nelson & Sons Transportation Co. and stock issued to Mrs. Nelson (formerly Mrs. Chilberg) and four of her seven children (including Kenneth Nelson, Clifford Nelson, and Charles Chilberg). Upon Mrs. Nelson's death in 1950, equal numbers of shares of her stock in Nelson Co. were devised to her seven children. In 1951, Kenneth Nelson sold his original shares received in 1947 to Charles Chilberg and Clifford Nelson, and agreed to sell to them

the remainder to which he was entitled on distribution of the estate. The distribution and transfer were made on January 23, 1953. Since that date, Charles and Clifford have been the principal stockholders in Nelson Co. Charles is now president and treasurer; Clifford is secretary and assistant treasurer.

Upon the sale of his stock in 1951, Kenneth Nelson resigned as an officer and director of Nelson Co. However, he kept his office at Nelson Co. headquarters in Ellington, Connecticut, and was retained by the company as a "free-lance tariff consultant." In such capacity he was paid approximately $15,000 in 1952 and $13,000 in 1953. While he claims to have been an independent contractor, his only client was Nelson Co. In the third week of January 1953, Kenneth Nelson wrote to Nelson Co.'s accountant, Mr. Sanol Solomon, requesting advice on the acquisition of Gilbertville Trucking Co. Soon thereafter Kenneth began negotiations with Gilbertville's owner, and on March 3, 1953, took over control. Since July 1953, all the stock in Gilbertville has been controlled by Kenneth.

In April of 1954 Charles Chilberg and Clifford Nelson obtained temporary authority from the Commission to take over the operations of R. A. Byrnes, Inc.; their acquisition of Byrnes stock was approved in August 1956.

The routes of these three carriers form a cohesive network along the eastern seaboard from Massachusetts to the District of Columbia. Gilbertville is presently certificated by the Commission as a common carrier for general commodities over regular and irregular routes between points in Massachusetts, Connecticut, Rhode Island, and New York City. Byrnes is certificated as a common carrier for general commodities over irregular routes between New York City, Philadelphia, the District of Columbia, and points adjacent to these cities. It is also certificated as a contract carrier of canned goods in Massachusetts,

Connecticut, and Rhode Island. Nelson is certificated as a common carrier for textile commodities over irregular routes between points in Massachusetts, New Hampshire, Rhode Island, Connecticut, and areas adjacent to New York and Philadelphia. It is also certificated for general commodities in intrastate traffic in Connecticut and Massachusetts. Thus, the Gilbertville and Byrnes general-commodity routes complement each other perfectly and overlap to a considerable degree the textile routes of Nelson.

Soon after his acquisition of Gilbertville, Kenneth Nelson instituted a number of permanent changes in the carrier's operations tending to integrate the terminal facilities of Nelson and Gilbertville; he received where necessary the cooperation of Nelson Co. Kenneth obtained permission from the Commission to move the business records and head offices of the acquired company from Gilbertville, Massachusetts, the place of incorporation, to Ellington, Connecticut, and took over the second floor of the Nelson Co. office building. Where possible Gilbertville used the Nelson terminals, subletting from Nelson in Ellington, Connecticut; New York City; Newton, Massachusetts; and Woonsocket, Rhode Island. Its only other terminal was at Gilbertville, Massachusetts. In seven cities, Gilbertville and Nelson were listed under the same telephone number, and they shared interterminal telephone lines. Almost identical changes took place in 1954 upon Commission approval of Charles Chilberg and Clifford Nelson's acquisition of Byrnes. Byrnes' offices were moved from Mullica Hill, New Jersey, to the Nelson Co. headquarters in Ellington, Connecticut; Byrnes shared the Nelson terminal in New York; it listed under the Nelson telephone number; it shared interterminal telephone lines. Since the Byrnes changes were the direct result of control and management in a common interest of Byrnes and Nelson in the hands of Charles and Clifford, it

might be inferred that the Gilbertville changes were similarly indicative of control and management in a common interest of Nelson and Gilbertville.

Further substantiation of this terminal integration is provided by a fourth corporation, Bergson Company, a real estate corporation formed to receive the residual properties of Mrs. Linnea Nelson's estate. Bergson owns the terminals leased to Nelson Co. at Philadelphia, Ellington, Woonsocket, and Newton, three of which are sublet to Gilbertville. Since Bergson is owned in equal shares by all seven children, all of whom are directors, it provides a direct corporate tie-in between Kenneth Nelson and his brothers.

While it is not unusual for independent carriers to share terminal facilities, as indeed Gilbertville and Nelson do with unrelated carriers in New York and Woonsocket, the repetition of such practices throughout their respective systems makes their alleged independence suspect. When these practices are then supplemented by further day-to-day practices integrating business, equipment, and managerial policies, the Commission is justified in concluding the carriers are in fact being managed and controlled in a common interest. Such additional practices are readily found in the record of this case.

Most significant is the equipment interdependence between Nelson and Gilbertville. When acquired for $35,000 in 1953, Gilbertville had a deficit about equal to the purchase price, assets of only $69,000, and a 1953 operating revenue of only $75,000. By 1956 Kenneth Nelson had increased the operating revenue to a seven-month figure of $444,777. This impressive growth was made in the face of a continual short-term credit squeeze and lack of working capital and equipment. Nelson Co., however, was operating in a declining textile market in the Northeast with highly periodic demands for carriage. As a result, Nelson had a fluctuating overcapacity in

equipment which was leased only to Gilbertville and occasionally Byrnes. Kenneth Nelson estimated that Gilbertville had from one to six tractor-trailer units on trip-lease from Nelson Co. every day and up to five other pieces of equipment on permanent lease, an amount equal at times to over one-half of Gilbertville's own carriage capacity. Added to this equipment interdependence between Nelson and Gilbertville were certain interlining practices.[2] Gilbertville interlined between 25% and 30% of its business. Over one-third of this interline business was with Nelson Co. and Byrnes, the majority being in truckload quantities. Owing to its equipment shortage, Gilbertville interlined with Nelson pursuant to a practice whereby a trip-lease was made out at the start of a run to take effect at the point of transfer to Gilbertville routes so that the Nelson tractor-trailer operated throughout the trip; moreover, the same driver might stay with the unit, changing employers at the point of transfer.[3]

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[2] "Interlining" is the practice whereby a carrier, whose certificated routes do not reach the shipment destination, transfers the shipment to another carrier for delivery. "Interchanging" is a form of interlining whereby the two interlining carriers switch trailers at the point of transfer. An interchange is most common where the shipment involves a truckload quantity, and the exchange of trailers obviates the necessity of unloading the shipment from the trailer of the transferor and loading it on the trailer of the transferee. The trailer taken in exchange for the shipment-trailer may be either empty or loaded with an interline shipment in the other direction. A further form of interlining involves the use of a trip-lease for the transferee's leg of the journey. There the shipment-trailer is taken by the transferee, but no trailer is given in exchange; instead the transferor will lease the shipment-trailer to the transferee for the completion of the trip.

[3] Commission employee Edward D. Shea testified that Gilbertville's terminal manager, John Kashady, had informed him that both these practices were regularly employed. Gilbertville records also indicate that Gilbertville lists the names of all Nelson drivers and keeps their doctor's certificates on file. Other records indicate that

Finally, the record includes evidence that on four occasions Commission employees discovered on highway spot checks that one of the carriers carried small shipments belonging to the other; that Nelson did about one-quarter of the Gilbertville repairs; and that Charles Chilberg and Kenneth Nelson each exercised managerial control over employees of both Nelson and Gilbertville.[4]

This evidence is sufficient to show that Nelson and Gilbertville were in fact being controlled and managed in a common interest to a considerable degree. If § 5 (4) was intended by Congress to reach such *de facto* relationships, the Commission was warranted in concluding the section was being violated.

I.

Section 5 (4) is part of a comprehensive legislative scheme designed to place ownership, management, and operational control over common carriers within the regulatory jurisdiction of the Commission. Simply, § 5 (2) (a) gives the Commission power to authorize and approve the

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Nelson drivers are often hired by Gilbertville during the same week and sometimes on the same day. The trip-lease arrangement is also supported by the fact that the majority of Nelson-Gilbertville interlining is at Monson, Connecticut, where Gilbertville Co. keeps only an open lot and, when possible, an empty, unguarded trailer for the receipt of less-than-truckload shipments. Kenneth Nelson's testimony on these practices is ambiguous but, if anything, supports their occurrence.

[4] Edward D. Shea testified that he observed Charles Chilberg hire and dispatch a Gilbertville driver at Newton.

He also testified that he observed Kenneth Nelson receive a teletype message in the Nelson Co. offices in Ellington, Connecticut, and direct Nelson Co. employees. The incident is disputed on the ground that Shea did not hear all the remarks made. On the other hand, it is to be noted that Kenneth Nelson refused to turn over upon request the teletype message he received on that occasion, an action in violation of Commission regulations.

joint operation of properties belonging to two or more common carriers or the merger of such carriers; § 5 (4) then declares,

> "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . As used in this paragraph . . . the words 'control or management' shall be construed to include the power to exercise control or management."

The complementary character of these two sections was discussed at some length in *United States* v. *Marshall Transport Co.*, 322 U. S. 31. As originally enacted in the Emergency Railroad Transportation Act of 1933, 48 Stat. 217, § 5 (4) was applicable only to railroads; it was extended to cover motor carriers in the Transportation Act of 1940, 54 Stat. 905, 907–908. As the appellants correctly state, Congress, in passing § 5 (4) and the supplementary § 5 (5) and (6),[5] was primarily concerned with

[5] Section 5 (4) is supplemented by § 5 (5) and (6) to cover specific instances where control over another carrier is accomplished with the aid of an intermediary. Section 5 (5) provides in part that control or management in a common interest is conclusively presumed whenever a person "affiliated" with a carrier joins with that carrier to acquire, or on his own acquires, control over another carrier. Section 5 (6) then provides that:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person

reaching the elaborate corporate devices used to centralize control over the railroads "without commission supervision and in defiance of the will of Congress." [6] Although Congress had intended the Transportation Act of 1920 to provide complete supervision, the Act proved inade-

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to such carrier . . . , it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

Parenthetically, § 5 (6) states that the relationship may be shown "by reason of the method of, or circumstances surrounding organization or operation . . . ."

[6] The Committee reports on these sections prior to their passage in the Emergency Railroad Transportation Act of 1933 stated their purpose as follows:

"These paragraphs have been planned in the light of what has already been done through myriad devices without commission supervision and in defiance of the will of Congress. . . . The provisions of paragraph [(4)] . . . would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised indirectly through the use of legal devices such as holding companies, voting trusts, and combinations of affiliated interests. It is therefore intended by the provisions of paragraphs [(5)], [(6)] . . . to make sure that paragraph [(4)] . . . covers such types of control and management." S. Rep. No. 87, 73d Cong., 1st Sess., pp. 9–10; H. R. Rep. No. 193, 73d Cong., 1st Sess., pp. 16–17.

The House manager of the bill similarly observed, 77 Cong. Rec. 4857:

"The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest. . . . It is to correct this condition, and to prevent through the use of holding companies and other devices the defeat of the congressional will, that this bill has been drawn."

Concrete examples of the devices Congress intended to reach are found in the testimony of Committee counsel Mr. Walter Splawn and Interstate Commerce Commissioner Joseph Eastman during the Hearings on H. R. 9059 before the House Committee on Interstate and Foreign Commerce, 72d Cong., 1st Sess., at 21–25, 34, 48–50, 61, 69–74 (1932).

quate to reach the holding company system.[7] On the basis of this history, the appellants argue that § 5 (4) is limited to proscription of corporate devices and will not reach the informal relationships shown on this record.

Such a narrow interpretation of the statute, however, confuses the particular manifestation of the problem with which Congress was faced in 1933 with the ultimate congressional intention of effectuating the Commission's jurisdiction under § 5 (2). On its face, § 5 (4) proscribes not just corporate and legal devices, but control effectuated "in any other manner whatsoever." Any doubt as to the scope of this phrase was removed when Congress added the definition of "control" to § 1 (3)(b) of the Act in the Transportation Act of 1940, 54 Stat. 899–900. This section states that for purposes of § 5 and other sections, "control" "shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation . . . ." We have construed this language to encompass every type of control in fact and have left to the agency charged with enforcement the determination from the facts whether "control" exists, subject to normal standards of review. *Marshall Transport Co., supra,* p. 38; *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151, 163–165; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146. In this manner, the Commission may adapt § 5 (4) to the actualities and current practices of the industry involved and apply it to the extent it feels necessary to protect its jurisdiction under § 5 (2) without having to return to Congress for additional authority every time industry practices change.

A cursory glance at Commission experience shows the type of informal practices in the motor carrier industry which the Commission has decided are covered by § 5 (4)

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[7] Hearings, *op. cit., supra,* note 6, pp. 16–19, 24–26; H. R. Rep. No. 650, 66th Cong., 2d Sess., pp. 63–64 (1920).

and must first be approved under § 5 (2). Typical of these practices have been attempts by active carriers to effectively lease the routes of a dormant carrier by interlining and trip-leasing their equipment continuously over the dormant carrier's routes, *e. g., Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M. C. C. 113; attempts by carriers to acquire other carriers by supplying funds to allegedly independent third-party purchasers, *e. g., Black—Investigation of Control—Colony Motor Transportation*, 75 M. C. C. 275; *Coldway Food Express, Inc.—Control and Merger—Foodway Express, Inc.*, 87 M. C. C. 123; attempts by inactive owners to allow an employee of another carrier to manage and merge operations of the two carriers, *e. g., Gate City Transport Co.—Control—Square Deal Cartage Co.*, 87 M. C. C. 591. In the present case, the trial examiner held that the facts in this record "require a finding" of control and management in a common interest in violation of § 5 (4). Division 4, after a similar review of the facts, concurred. On reconsideration, the full Commission affirmed the finding and conclusion of the examiner and Division 4. Judicial review of this conclusion is limited to consideration of whether it has a rational basis and is supported by substantial evidence. *United States* v. *Pierce Auto Lines, Inc.*, 327 U. S. 515; *Mississippi Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287.[8] After our review of the facts and statutory sections involved, we detect no reason to disturb this finding.[9]

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[8] In *Rochester Telephone Corp.* v. *United States, supra*, pp. 145–146, this Court gave the following test for reviewing a similar finding of "control" by the Federal Communications Commission as that word is used in the Federal Communications Act, 48 Stat. 1064, 47 U. S. C. § 152 (b): "This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand."

[9] In view of the direct finding of a § 5 (4) violation by the Commission and our determination that such a finding was warranted by

II.

However, even admitting a § 5 (4) violation, the appellants protest as arbitrary the denial of their application for approval of the proposed merger of Nelson and Gilbertville. Section 5 (2) provides that a transaction within its scope is to be approved if found to be "consistent with the public interest." The statute entrusts the Commission with the duty to decide what considerations other than those specifically mentioned in § 5 (2)(c) shall be given weight. Cf. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 86–88; *Schwabacher* v. *United States,* 334 U. S. 182, 193. As in the case of an original application for a certificate, the Commission has chosen to give weight to an applicant's fitness. *E. g., Transamerican Freight Lines, Inc.—Control and Merger—The Cumberland Motor Express Corp.,* 75 M. C. C. 423, 428; cf. Interstate Commerce Act, § 207, 49 Stat. 551, 49 U. S. C. § 307. Integral to a determination of fitness is the applicant's willingness and ability to fulfill its obligations to

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the statute and evidence, we find it unnecessary to consider the Commission's alternative holding that Kenneth Nelson was "affiliated" with Nelson within the meaning of § 5 (6) and is therefore presumed to have effectuated control or management in a common interest pursuant to § 5 (5) when he acquired Gilbertville.

The appellants attack the opinion of the District Court on the ground that there are variations between its statement of facts and the findings of the Commission. Such variations are insignificant in light of the fact that the court then quotes the findings of the Commission giving record citations for each statement. The appellants also contend that when the District Court found certain of the Commission's findings to be "trivial" and "irrelevant," it should have remanded for further findings. However, as the court itself pointed out, its disagreements with the Commission were minor and did not affect the substance of the Commission's ultimate finding of a violation. Cf. *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 67.

the Commission, considerations which may be demonstrated in part by past or continuing violations of Commission regulations. *E. g., Powell—Purchase—Rampy,* 57 M. C. C. 597. This has not been contested by the appellants, and its relevance to a finding of consistency with the public interest is self-evident. Nor do they dispute the principle recently stated by the Commission in *Central of Georgia R. Co. Control,* 307 I. C. C. 39, 43, that a § 5 (4) violation may alone bar approval of a merger unless, "upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval." Rather, they contend that in this case the Commission refused to consider all the facts presented and, in effect, made a § 5 (4) violation an automatic bar to approval of a subsequent merger. To support this allegation, the appellants point to the undisputed findings of the trial examiner that the violation in this case was neither willful, flagrant, nor the result of persistent disregard for regulation. They compare these findings with past Commission holdings that violations will be overlooked in the absence of willfulness, *e. g., Gate City Transport Co.—Control—Square Deal Cartage Co., supra,* and conclude that the rule applied in the present case must have been automatic.

However, even an automatic rule is not necessarily arbitrary. As already noted, § 5 (4) is integral to the success of the regulatory scheme. To approve a merger in the face of a § 5 (4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a *fait accompli* or avoid its jurisdiction altogether. As the Commission pointed out in *Central of Georgia,* if such practices were encouraged, "our administration of the statute in the public interest would be seriously hindered, if not defeated." 307 I. C. C., at 44. This additional interest in the proper administration of the statute places

upon the applicant a heavier burden than may be the case for other regulatory violations, and mere lack of willfulness or alleged innocence need not suffice.

In fact, the Commission's rule is not automatic and will give way to a clear showing of public interest in approval. However, the appellants cannot attack the Commission's order under even this less stringent rule since they made no clear showing of a public interest in approval such as a public need for the merged service or for larger consolidated carriers. The order denying the merger is therefore affirmed.

III.

The Commission's final order requires Kenneth Nelson to divest himself of his stock in Gilbertville Co. in order to terminate the § 5 (4) violation. No other reference to divestiture can be found. In view of his recommendation that the merger be approved, the trial examiner made no findings or recommendations on a remedy for the violation. Division 4, upon denial of the merger, simply ordered that each of the applicants is hereby "required to terminate the violation." On reconsideration, the full Commission reinstated Division 4's order, but added, without explanation in its report, the order to divest. The District Court attempted to provide the rationale by suggesting that divestiture was so perfectly suited to the nature of the violation, an unlawful acquisition, that no explanation was necessary.

There is little question that divestiture is within the scope of the Commission's power since, with respect to a § 5 (4) violation, it may order any party to "take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation." § 5 (7). Where the unlawful control is the result of an acquisition, divestiture may be the only effective remedy. However, as § 5 (7) itself implies, the Commission's power is cor-

rective, not punitive. The justification for the remedy is the removal of the violation.

The use of equitable powers to expunge a statutory violation has been fully developed in the context of the antitrust laws and is, in many respects, applicable to § 5 (7). The "most drastic, but most effective" of these remedies is divestiture. And "[i]f the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326–327. Our duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of private parties or the general public. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185. As these cases indicate, the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described. Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–331.

As § 5 (7) expressly states, the Commission is charged with choosing the proper remedy in this case. Judicial review is accordingly limited. "It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U. S. 608, 612. But prerequisite to such review is evidence that a judgment was in fact made, that the parties were heard on the issue, that the proper standards were applied. We find no such evidence in this record. Rather we are faced with evidence that the statutory violation occurred not just from Kenneth Nelson's act of acquiring Gilbertville,

but from the acquisition plus subsequent practices integrating the management and operations of Nelson and Gilbertville, practices that could conceivably be discontinued without divestiture. In addition the trial examiner found that the violation was not willful and that the parties' experience in this proceeding would make them more responsive to regulation in the future.

By referring to these mitigating considerations, we have no intention of prejudging the Commission or implying that divestiture would be unwarranted after proper treatment of the issue. These considerations merely indicate that a doubt can be raised and that a remand to the Commission is not purely academic for the sake of procedural regularity. When the Commission has exercised its judgment and issued its considered opinion, the propriety of the remedy chosen will be ripe for review. *Jacob Siegel Co.* v. *Federal Trade Comm'n, supra;* Administrative Procedure Act, § 8 (b), 60 Stat. 242, 5 U. S. C. § 1007 (b).

The judgment of the District Court is reversed in part and the case remanded for further proceedings in conformity with this opinion.

It is so ordered.

PEARLMAN, TRUSTEE IN BANKRUPTCY, *v.* RELIANCE INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 78. Argued October 9–10, 1962.—
Decided December 3, 1962.

When, by reason of the contractor's default, a surety on a payment bond given by a contractor under the Miller Act, 49 Stat. 793, has been compelled to pay debts of the contractor for labor and materials, the surety is entitled by subrogation to reimbursement from a fund otherwise due to the contractor but withheld by the Government pursuant to the terms of the contract—even though the contractor has become bankrupt and the Government has turned the withheld fund over to the contractor's trustee in bankruptcy. Pp. 133–142.

(a) This fund never became a part of the bankruptcy estate and its disposition is not controlled by the Bankruptcy Act. Pp. 135–136.

(b) *Prairie State Bank* v. *United States,* 164 U. S. 227, and *Henningsen* v. *United States Fid. & Guar. Co.,* 208 U. S. 404, followed. Pp. 137–139.

(c) The Miller Act, which requires separate performance and payment bonds on Government contracts, did not change the law as declared in the *Prairie State Bank* and *Henningsen* cases. Pp. 139–140.

(d) The *Prairie State Bank* and *Henningsen* cases were not overruled by *United States* v. *Munsey Trust Co.,* 332 U. S. 234. Pp. 140–142.

298 F. 2d 655, affirmed.

Raymond T. Miles argued the cause for petitioner. With him on the briefs was *Lowell Grosse.*

Mark N. Turner argued the cause and filed briefs for respondent.

John G. Street, Jr. and *Edward M. Murphy* filed briefs as *amici curiae,* urging reversal.

David Morgulas filed a brief for the Association of Casualty & Surety Companies, as *amicus curiae*, urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a dispute between the trustee in bankruptcy of a government contractor and the contractor's payment bond surety over which has the superior right and title to a fund withheld by the Government out of earnings due the contractor.

The petitioner, Pearlman, is trustee of the bankrupt estate of the Dutcher Construction Corporation, which in April 1955 entered into a contract with the United States to do work on the Government's St. Lawrence Seaway project. At the same time the respondent, Reliance Insurance Company,[1] executed two surety bonds required of the contractor by the Miller Act, one to guarantee performance of the contract, the other to guarantee payment to all persons supplying labor and material for the project.[2] Under the terms of the contract, which was attached to and made a part of the payment bond, the United States

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[1] The company was then known as Fire Association of Philadelphia.

[2] 40 U. S. C. § 270a provides in part as follows:

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person."

was authorized to retain and hold a percentage of estimated amounts due monthly until final completion and acceptance of all work covered by the contract. Before completion Dutcher had financial trouble and the United States terminated its contract by agreement. Another contractor completed the job, which was finally accepted by the Government. At this time there was left in the Government's withheld fund $87,737.35, which would have been due to be paid to Dutcher had it carried out its obligation to pay its laborers and materialmen. Since it had not met this obligation, its surety had been compelled to pay about $350,000 to discharge debts of the contractor for labor and materials. In this situation the Government was holding over $87,000 which plainly belonged to someone else, and the fund was turned over to the bankrupt's trustee, who held it on the assumption that it had been property of the bankrupt at the time of adjudication and therefore had vested in the trustee "by operation of law" under § 70 of the Bankruptcy Act.[3] The surety then filed a petition in the District Court denying that the fund had vested in the trustee, alleging that it, the surety, was "the owner of said sum" of $87,737.35 "free and clear of the claims of the Trustee in Bankruptcy or any other person, firm or corporation," and seeking an order directing the trustee to pay over the fund to the surety forthwith.[4] The referee in bankruptcy, relying chiefly on this Court's opinion in *United States* v. *Munsey Trust Co.*, 332 U. S. 234 (1947), held that the surety had no superior rights in the fund, refused to direct payment to the surety, and

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[3] 30 Stat. 565 (1898), 11 U. S. C. § 110.

[4] The surety appears also to have claimed some general priority over all creditors for the entire $350,000 it had paid out for the contractor, based on "liens, subrogation and assignment," but here its petition for certiorari and briefs seem to limit its claim to the net amount of the retained fund turned over to the trustee by the Government.

accordingly ordered the surety's claim to be allowed as that of a general creditor only to share on an equality with the general run of unsecured creditors.[5] The District Court vacated the referee's order and held that cases decided prior to *Munsey* had established the right of a surety under circumstances like this to be accorded priority over general creditors and that *Munsey* had not changed that rule.[6] The Second Circuit affirmed.[7] Other federal courts have reached a contrary result,[8] and as the question is an important and recurring one, we granted certiorari to decide it.[9]

One argument against the surety's claim is that this controversy is governed entirely by the Bankruptcy Act and that § 64, 11 U. S. C. § 104, which prescribes priorities for different classes of creditors, gives no priority to a surety's claim for reimbursement. But the present dispute—who has the property interests in the fund, and how much—is not so simply solved. Ownership of property rights before bankruptcy is one thing; priority of distribution in bankruptcy of property that has passed unencumbered into a bankrupt's estate is quite another. Property interests in a fund not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable, mortgages, liens, or simple priority of rights, are of course not a part of the bankrupt's property and do not vest in the trustee. The Bankruptcy Act simply does not authorize a trustee to distribute other peo-

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[5] 35 J. N. A. Ref. Bankr. 81 (1961).

[6] *In re Dutcher Constr. Corp.*, 197 F. Supp. 441 (D. C. W. D. N. Y. 1961).

[7] 298 F. 2d 655 (C. A. 2d Cir. 1962).

[8] See, *e. g.*, *American Sur. Co.* v. *Hinds*, 260 F. 2d 366 (C. A. 10th Cir. 1958); *Phoenix Indem. Co.* v. *Earle*, 218 F. 2d 645 (C. A. 9th Cir. 1955).

[9] 369 U. S. 847 (1962).

ple's property among a bankrupt's creditors.[10] So here if the surety at the time of adjudication was, as it claimed, either the outright legal or equitable owner of this fund, or had an equitable lien or prior right to it, this property interest of the surety never became a part of the bankruptcy estate to be administered, liquidated, and distributed to general creditors of the bankrupt. This Court has recently reaffirmed that such property rights existing before bankruptcy in persons other than the bankrupt must be recognized and respected in bankruptcy.[11] Consequently our question is not who was entitled to priority in distributions under § 64, but whether the surety had, as it claimed, ownership of, an equitable lien on, or a prior right to this fund before bankruptcy adjudication.

Since there is no statute which expressly declares that a surety does acquire a property interest in a fund like this under the circumstances here, we must seek an answer in prior judicial decisions. Some of the relevant factors in determining the question are beyond dispute. Traditionally sureties compelled to pay debts for their principal have been deemed entitled to reimbursement, even without a contractual promise such as the surety here had.[12] And probably there are few doctrines better established

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[10] See Justice Holmes' discussion in *Sexton* v. *Kessler & Co.*, 225 U. S. 90, 98–99 (1912). As to the difficulties inherent in phrases like "equitable lien," see Glenn, The "Equitable Pledge", Creditors' Rights, and the Chandler Act, 25 Va. L. Rev. 422, 423 (1939).

[11] *United States* v. *Durham Lumber Co.*, 363 U. S. 522 (1960). See also *Security Mortgage Co.* v. *Powers*, 278 U. S. 149 (1928), and cases collected in 6 Am. Jur., Bankruptcy, § 949 (rev. ed. 1950). Cf. *Aquilino* v. *United States*, 363 U. S. 509 (1960).

[12] "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Memphis & L. R. R. Co.* v. *Dow*, 120 U. S. 287, 301–302 (1887).

than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.[13] This rule, widely applied in this country[14] and generally known as the right of subrogation, was relied on by the Court of Appeals in this case. It seems rather plain that at least two prior decisions of this Court have held that there is a security interest in a withheld fund like this to which the surety is subrogated, unless, as is argued, the rule laid down in those cases has been changed by passage of the Miller Act or by our holding in the *Munsey* case. Those two cases are *Prairie State Bank* v. *United States,* 164 U. S. 227 (1896), and *Henningsen* v. *United States Fid. & Guar. Co.,* 208 U. S. 404 (1908).

In the *Prairie Bank* case a surety who had been compelled to complete a government contract upon the contractor's default in performance claimed that he was entitled to be reimbursed for his expenditure out of a fund that arose from the Government's retention of 10% of the estimated value of the work done under the terms of the contract between the original contractor and the Government. That contract contained almost the same provisions for retention of the fund as the contract presently before us. The Prairie Bank, contesting the surety's claim, asserted that it had a superior equitable lien arising from moneys advanced by the bank to the contractor before the surety began to complete the work. The Court, in a well-reasoned opinion by Mr. Justice White, held that this fund materially tended to protect the surety,

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[13] See, *e. g., Hampton* v. *Phipps,* 108 U. S. 260, 263 (1883); *Lidderdale's Executors* v. *Robinson's Executor,* 12 Wheat. 594 (1827); *Duncan, Fox, & Co.* v. *North and South Wales Bank,* 6 App. Cas. 1 (H. L. 1880). See generally Sheldon, Subrogation, § 11 (1882).

[14] See cases collected in 50 Am. Jur., Subrogation, § 49 (1944).

that its creation raised an equity in the surety's favor, that the United States was entitled to protect itself out of the fund, and that the surety, by asserting the right of subrogation, could protect itself by resort to the same securities and same remedies which had been available to the United States for its protection against the contractor. The Court then went on to quote with obvious approval this statement from a state case:

> "The law upon this subject seems to be, the reserved per cent to be withheld until the completion of the work to be done is as much for the indemnity of him who may be a guarantor of the performance of the contract as for him for whom it is to be performed. And there is great justness in the rule adopted. Equitably, therefore, the sureties in such cases are entitled to have the sum agreed upon held as a fund out of which they may be indemnified, and if the principal releases it without their consent it discharges them from their undertaking." 164 U. S., at 239, quoting from *Finney* v. *Condon*, 86 Ill. 78, 81 (1877).

The *Prairie Bank* case thus followed an already established doctrine that a surety who completes a contract has an "equitable right" to indemnification out of a retained fund such as the one claimed by the surety in the present case. The only difference in the two cases is that here the surety incurred his losses by paying debts for the contractor rather than by finishing the contract.

The *Henningsen* case, decided 12 years later in 1908, carried the *Prairie Bank* case still closer to ours. Henningsen had contracts with the United States to construct public buildings. His surety stipulated not only that the contractor would perform and construct the buildings, but also, as stated by the Court, that he would "pay promptly

and in full all persons supplying labor and material in the prosecution of the work contracted for." [15] Henningsen completed the buildings according to contract but failed to pay his laborers and materialmen. The surety paid. This Court applied the equitable principles declared in the *Prairie Bank* case so as to entitle the surety to the same equitable claim to the retained fund that the surety in the *Prairie Bank* case was held to have. Thus the same equitable rules as to subrogation and property interests in a retained fund were held to exist whether a surety completes a contract or whether, though not called upon to complete the contract, it pays the laborers and materialmen. These two cases therefore, together with other cases that have followed them,[16] establish the surety's right to subrogation in such a fund whether its bond be for performance or payment. Unless this rule has been changed, the surety here has a right to this retained fund.

It is argued that the Miller Act [17] changed the law as declared in the *Prairie Bank* and *Henningsen* cases. We think not. Certainly no language of the Act does, and we have been pointed to no legislative history that indicates such a purpose. The suggestion is, however, that a congressional purpose to repudiate the equitable doctrine of the two cases should be implied from the fact that the Miller Act required a public contract surety to execute two bonds instead of the one formerly required. It is true that the Miller Act did require both a performance

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[15] 208 U. S., at 410.

[16] See, *e. g.*, *Martin* v. *National Sur. Co.*, 85 F. 2d 135 (C. A. 8th Cir. 1936), aff'd, 300 U. S. 588 (1937); *In re Scofield Co.*, 215 F. 45 (C. A. 2d Cir. 1914); *National Sur. Corp.* v. *United States*, 132 Ct. Cl. 724, 133 F. Supp. 381, cert. denied *sub nom. First Nat. Bank* v. *United States*, 350 U. S. 902 (1955).

[17] See note 2, *supra*.

bond and an additional payment bond, that is, one to assure completion of the contract and one to assure payments by the contractor for materials and labor. But the prior Acts on this subject, while requiring only one bond, made it cover both performance and payment.[18] Neither this slight difference in the new and the old Acts nor any other argument presented persuades us that Congress in passing the Miller Act intended to repudiate equitable principles so deeply imbedded in our commercial practices, our economy, and our law as those spelled out in the *Prairie Bank* and *Henningsen* cases.[19]

The final argument is that the *Prairie Bank* and *Henningsen* cases were in effect overruled by our holding and opinion in *United States* v. *Munsey Trust Co., supra.* The point at issue in that case was whether the United States while holding a fund like the one in this case could offset against the contractor a claim bearing no relationship to the contractor's claim there at issue. We held that the Government could exercise the well-established common-law right of debtors to offset claims of their own against their creditors. This was all we held. The opinion contained statements which some have interpreted [20] as meaning that we were abandoning the established legal and equitable principles of the *Prairie Bank* and *Henningsen* cases under which sureties can indemnify themselves against losses. But the equitable rights of a surety declared in the *Prairie Bank* case as to sureties who com-

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[18] 28 Stat. 278 (1894), amended, 33 Stat. 811 (1905).

[19] Among the problems which would be raised by a contrary result would be the unsettling of the usual view, grounded in commercial practice, that suretyship is not insurance. This distinction is discussed in Cushman, Surety Bonds on Public and Private Construction Projects, 46 A. B. A. J. 649, 652–653 (1960).

[20] See note 8, *supra.*

plete the performance of a contract were expressly recognized and approved in *Munsey*,[21] and the *Henningsen* rule as to sureties who had not completed the contract but had paid laborers was not mentioned. *Henningsen* was not even cited in the *Munsey* opinion. We hold that *Munsey* left the rule in *Prairie Bank* and *Henningsen* undisturbed. We cannot say that such a firmly established rule was so casually overruled.[22]

We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become entitled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it.[23] Consequently, since the surety in this case has paid

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[21] 332 U. S., at 240.

[22] State courts likewise apply the rule that sureties on public contracts are entitled to the benefits of subrogation. See cases collected in 43 Am. Jur., Public Works and Contracts, § 197 (1942).

[23] See the somewhat different but closely related discussion by which Mr. Justice Cardozo, speaking for this Court, reached a similar result in *Martin* v. *National Sur. Co.*, 300 U. S. 588, 597–598 (1937).

Our result has also been reached by the Court of Claims in cases substantially like ours. *Continental Cas. Co.* v. *United States*, 145 Ct. Cl. 99, 169 F. Supp. 945 (1959); *National Sur. Corp.* v. *United States*, 132 Ct. Cl. 724, 133 F. Supp. 381, cert. denied *sub nom. First Nat. Bank* v. *United States*, 350 U. S. 902 (1955); *Royal Indem. Co.* v. *United States*, 117 Ct. Cl. 736, 93 F. Supp. 891 (1950). See generally Speidel, "Stakeholder" Payments Under Federal Construction Contracts: Payment Bond Surety vs. Assignee, 47 Va. L. Rev. 640, 646–648 (1961); note, Reconsideration of Subrogative Rights of the Miller Act Payment Bond Surety, 71 Yale L. J. 1274 (1962); comment, 33 Cornell L. Q. 443 (1948).

out more than the amount of the existing fund, it has a right to all of it. On this basis the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE WHITE dissents.

MR. JUSTICE CLARK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in the result.

The Court holds that the surety company here is entitled to the funds the Government has paid into court on the theory that the surety is subrogated to the claims of the laborers and materialmen which it has paid. I cannot agree. None of the cases in this Court so hold. Indeed, in *United States* v. *Munsey Trust Co.*, 332 U. S. 234 (1947), this Court said:

> "But nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation. . . . They cannot acquire a lien on public buildings . . . and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment. Of these, the last and the one now in force is the Miller Act under which the bonds here were drawn." *Id.*, at p. 241.
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> "[I]t is elementary that one cannot acquire by subrogation what another whose rights he claims did not have. . . ." *Id.*, at p. 242.

Since the laborers and materialmen have no right against the funds, it follows as clear as rain that the surety could have none. It appears to me that today's holding that laborers and materialmen had "rights" to funds in the Government's hands might jeopardize the rights of the United States and have serious consequences for its building operations. The Congress has not so provided and I would not so hold.

However, this Court has held in two cases not necessary to the decision in *Munsey* that the surety who pays laborers' and materialmen's claims stands in the shoes of the United States and is entitled to surplus funds remaining in its hands after the contract is completed. The first is *Prairie State Bank* v. *United States,* 164 U. S. 227 (1896), and the other *Henningsen* v. *U. S. Fid. & Guar. Co.,* 208 U. S. 404 (1908). In neither of those cases, however, did the Court find that laborers and materialmen had any right against the United States but only that the "Guaranty Company [was] entitled to subrogation to any right of the United States Government arising through the building contract." *Henningsen, supra,* at p. 410.

Since the funds here have been paid into court by the Government, there is some question whether the doctrine of those cases would apply. In each of them the money was in the hands of the United States at the time the suit was commenced and was clearly applicable to payment of any debt under the contract. It would, therefore, be my view that the equities existing here in favor of the surety grow out of the contract between it and the contractor (in whose shoes the trustee now stands), which was made in consideration of the execution of the bond. Under that agreement in the event of any breach or default in the construction contract all sums becoming due thereunder were assigned to the surety to be credited against any loss or damage it might suffer thereby. In *Martin* v. *National Surety Co.,* 300 U. S. 588 (1937), this Court in an identical situation* awarded such a fund to

*In *Martin* the contractor assigned to the surety "all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or . . . thereafter . . . ." *Id.,* at pp. 590–591. Here the assignment was of, *inter alia,* "Any and all

the surety. Mr. Justice Cardozo, for a unanimous Court, said: "In our view of the law, the equities in favor of materialmen growing out of that agreement [between the surety and the contractor] were impressed upon the fund in the possession of the court." *Id.*, at pp. 593–594. It is well to note also that the Court of Appeals in *Martin* had based its decision on the theory announced by the Court today, but Mr. Justice Cardozo for a unanimous Court chose the "narrower" ground of the assignment in affirming the judgment for the surety. I agree with *Martin* as to the "narrower" ground and believe the Court should keep the opinion today "within the necessities of the specific controversy" rather than enlarging upon the rules of *Henningsen* and *Prairie State Bank*. In so doing the Court would but fulfill the prophecy made in *Martin* that "the grounds chosen . . . may be expected to be helpful as a guide in other cases." *Id.*, at p. 593.

I would affirm the judgment on this basis.

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percentages of the contract price retained on account of said contract, and any and all sums that may be due under said contract at the time of such . . . forfeiture or breach, or that thereafter may become due . . . ."

FEDERAL POWER COMMISSION *v.* TENNESSEE GAS TRANSMISSION CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 48. Argued October 17, 1962.—Decided December 3, 1962.*

Under § 4 of the Natural Gas Act, a natural gas pipeline company filed increased rate schedules for its 6 different rate zones. All such increased rates were predicated, in part, on a cost of service which included a claim to a 7% rate of return on investment. After suspension by the Federal Power Commission for the full 5 months permitted by law, the new rates went into effect, subject to refund of any portion not ultimately justified in proceedings before the Commission. Several months later, after hearings, the Commission treated separately the issue of the rate of return on investment, found that 7% was excessive and that 6⅛% would be proper, and ordered an interim rate reduction and an immediate refund of the amounts collected in excess of the resulting lower rates. It deferred determination of other issues in the proceeding, including the allocation of over-all costs of the company's services among its 6 rate zones. *Held:* This was an appropriate exercise of the power granted the Commission by the Act. Pp. 146–155.

293 F. 2d 761, affirmed in part and reversed in part.

Ralph S. Spritzer argued the cause for petitioner in No. 48. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick, Acting Assistant Attorney General Guilfoyle, Morton Hollander, Richard A. Solomon, Howard E. Wahrenbrock, Luke R. Lamb* and *Peter H. Schiff.*

Charles S. Rhyne argued the cause for petitioner in No. 50. With him on the briefs were *David W. Craig, Herzel H. E. Plaine* and *Edward D. Means, Jr.*

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*Together with No. 50, *Pittsburgh* v. *Tennessee Gas Transmission Co. et al.*, also on certiorari to the same Court.

Harry S. Littman argued the cause for Tennessee Gas Transmission Co., respondent. With him on the briefs were *William C. Braden, Jr., Jack Werner* and *Harold L. Talisman.*

Brooks E. Smith argued the cause for Manufacturers Light & Heat Co. et al., respondents. With him on the briefs were *William Anderson, Alfred A. Green* and *Herbert W. Bryan.*

David Stahl, Attorney General of Pennsylvania, and *Herbert E. Squires* filed a brief for the Commonwealth of Pennsylvania et al., as *amici curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case involves the authority of the Federal Power Commission after hearing to order an interim rate reduction as well as a refund of amounts collected in excess thereof where a portion of a previously filed increased rate is found unjustified but the remainder of the proceeding is deferred. Respondent Tennessee Gas Transmission Company, a natural gas company, included within its filed increased rate schedule a 7% over-all return on its net investment. In considering this item [1] along with others involved in the filing, including the allocation of the over-all cost of service among its rate zones, the Commission concluded, after a full hearing, that 6⅛% rather than the filed 7% would be a just and reasonable return. It accordingly required Tennessee Gas to file reduced rates, based on the lower return figure, retroactive to the end of a five-month suspension period, and ordered a refund of the excessive amounts collected since that date. 24 F. P. C. 204. The Court of Appeals, 293 F. 2d 761,

[1] On motion of the Commission's staff counsel, the proceeding was divided into two phases: (1) determination of rate of return; (2) determination of other factors, including allocation of rates among zones.

found that the 6⅛% return was just and reasonable. It held, however, by a divided vote, that the Commission erred in ordering an immediate reduction and refund since it had not determined other issues in the proceeding, particularly that of the proper allocation of the over-all costs of the company's services among its six zones. The latter, the court reasoned, might be determinative of the ultimate question of whether the over-all filed rates in each zone were just and reasonable; therefore, the interim order might result in irretrievable loss to the company. The importance of the question in the administration of the Natural Gas Act led us to grant certiorari, 368 U. S. 974. We have concluded that the issuance of the order was an appropriate exercise of the power granted the Commission by the Act.

I.

Tennessee Gas does not have a system-wide rate applicable to all services regardless of where performed. It has since the early 1950's, with Commission approval, divided its extensive pipeline system into six rate zones with rate differentials. The appropriate allocation of its costs of service among these zones and types of customers was not then decided by the Commission nor agreed upon between the parties, but was left for future decision. It was in this posture that in 1959 Tennessee Gas, pursuant to § 4 (d) of the Natural Gas Act,[2] filed with the Com-

[2] 15 U. S. C. § 717c (d):

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without

mission proposed increased rates for its six rate zones. The rates were predicated upon a cost of service which included a claim to a 7% rate of return on net investment. At the inception of hearings on the reasonableness of the filed rates the Commission, under its § 4 (e) [3] authority, imposed a five-month suspension period on the proposed increase after which the rates became effective subject to refund of any portion not ultimately justified by Tennessee Gas in the proceedings.

Hearings commenced on February 2, 1960, and Tennessee Gas presented its evidence on cost of service and rate of return. The Commission staff presented evidence on the latter alone and then proposed that the rate of return issue be treated separately from cost of service and allocation of rates among zones. At the time of this proposal to the Commission the zone allocation issue was also pending in another docket in a proceeding involving Tennessee Gas. By motion Tennessee Gas requested that the allocation issue be decided simultaneously with that involving the rate of return. On August 5, 1960, this motion was denied, and four days later the Commission issued the interim order under attack here. It found that a 7% return was excessive and that a 6⅛% rate of return was just and reasonable. This finding was based on the

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requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

[3] 15 U. S. C. § 717c (e):

"Whenever any such new schedule is filed the Commission shall have authority . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect. . . ."

Commission's determination that Tennessee Gas had failed to justify a rate of return greater than 6⅛%. Accordingly, the Commission issued an interim order which disallowed the 7% return, required Tennessee Gas to file appropriate lower rates retroactively to the effective date of the increased rates and ordered refunds of the differences collected since that time. Tennessee Gas does not contest the Commission's determination that a 6⅛% return on its net investment is just and reasonable. It does contend that to require the refunds prior to a determination of cost allocation among its zones of operation might result in its being unable to realize this return during the refund period. In this connection it points out that the rates as finally determined might, in some of its zones, be above the rates collected less the refund ordered. This would result in Tennessee Gas not being able to recoup a return of 6⅛% since it would be unable to collect retroactively the higher rates found appropriate in those zones while it would be required to make full refunds in the remaining lower rate zones.

The Court of Appeals, in setting aside the Commission's order of immediate reduction and refund, found that it was unreasonable and an abuse of discretion to thus splinter the issues, especially since the cost allocation among zones issue was deemed "ripe for decision," [4] and

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[4] In this connection we note the Commission found:

"Hearings on the cost allocation issue, severed from the other issues in Docket No. G–11980 by Commission order, were concluded on December 17, 1959, and briefing thereon was concluded on April 11, 1960. Tennessee's motion for omission of the intermediate decision on that issue is neither timely nor concurred in by the other parties to the proceeding. Further, while we recognize that an early decision on that issue is desirable, the nature and considerable size of the record, indicates that it would be more practicable in the interests of an early decision and in the interest of effective administration of the Natural Gas Act, that the Presiding Examiner, who has available

a ruling on it was an "essential element in determining whether the filed rates are excessive." The court also questioned whether a hearing confined to the issue of rate of return was such a "full hearing" as § 4 (e) demands prerequisite to a rate-change and refund order.

The Federal Power Commission and the City of Pittsburgh, which is acting in behalf of resident consumers of natural gas, are here in separate cases. Since they raise identical factual and legal issues, we consider the two cases together.[5]

II.

As all of the respondents admit, there is "no question" as to the Commission's authority to issue interim rate orders. Indeed, such general authority is well established by cases in this Court, *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942); *New England Divisions Case*, 261 U. S. 184 (1923), as well as in the Courts of Appeals. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 236 F. 2d 606 (C. A. 3d Cir. 1956); *State Corporation Comm'n of Kansas* v. *Federal Power Comm'n*, 206 F. 2d 690 (C. A. 8th Cir. 1953). It is true that none of these cases involved an undecided cost allocation issue applicable retroactively. However, in *Natural Gas Pipeline Co.* this Court took pains to point out the fact that

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knowledge of that record, should proceed with consideration of the evidence and render decision thereon." Unreported order of the Commission issued Aug. 5, 1960.

[5] Respondents Columbia Gas Companies raise a separate point as to their not being permitted to offer evidence in this case as to cost allocation. We note that they had a full opportunity to do so in another proceeding involving the same parties. This contention, therefore, has no merit. This hearing, insofar as it determined that the rate of return was unreasonable, was to that extent and for the purpose of the interim order the "full hearing" contemplated by the statute, even though it did not at that time dispose of the entire case.

"establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other." 315 U. S., at p. 584. Significantly, that case also involved the issue of a fair rate of return and "the adjustment of a rate schedule . . . so as to eliminate discriminations and unfairness from its details." *Ibid.* And the Court specifically found power to order a decrease in rates "without establishing a specific schedule." It declared that the proviso of § 5 [6] authorized the Commission to "order a decrease where existing rates are unjust . . . or are not the lowest reasonable rates." Finally, the Court concluded that § 16 [7] placed discretion

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[6] 15 U. S. C. § 717d (a):

". . . *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

[7] 15 U. S. C. § 717o:

"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules

in the Commission to "issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this chapter." Here the Commission took similar action directing Tennessee Gas to file a new schedule which would reflect the prescribed 7/8% reduction in the rate of return and, in addition, to refund under § 4 (e) the amounts collected in excess of the lower, substituted charges reflecting the lawful rate of return. The fact that the *Natural Gas Pipeline Co.* case was initiated under § 5 of the Act and the refund provisions of § 4 (e) were not available was, in our opinion, of no consequence since the hazard of not making a profit remains on the company in each instance. "Discriminations and unfairness" if later found present in Natural Gas Pipeline's schedule might have caused it losses just as the refunds might here. In addition, an analysis of the policy of the Act clearly indicates that a natural gas company initiating an increase in rates under § 4 (d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being "just and reasonable." In addition, the company can never recoup the income lost when the five-month suspension power of the Commission is exercised under § 4 (e). The company is also required to refund any sums thereafter collected should it not sustain its burden of proving the reasonableness of an increased rate, and it may suffer further loss when the Commission upon a finding of excessiveness makes adjustments in the rate detail of the company's filing. In this latter respect a rate for one class or zone of customers may be found by the Commission to

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and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. (June 21, 1938, ch. 556, § 16, 52 Stat. 830.)"

be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter. Such situations are entirely consistent with the policy of the Act and, we are told, occur with frequency. The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.

Nor do we share the doubts of the Court of Appeals concerning the practicalities of the two-step procedure invoked by the Commission. We cannot see how the severance of the two issues left Tennessee Gas without guidance as to "the extent to which individual rates should be reduced, or to whom refunds are due." 293 F. 2d, at p. 767. The Commission has found that the revised over-all rate schedule should have been calculated on a rate of return of 6⅛% rather than 7%. As a result the over-all rate was to that extent unlawful and refunds were due across the board to all customers in the Tennessee Gas system. The interim order directed their payment. True, the old and undecided zone rate structure under attack as discriminatory was left in effect by this order and survives a bit longer. But the probabilities present in that situation are more than offset by the certainty of the Commission's actions in finding the 7% rate unlawful, fixing the 6⅛% lawful return and giving timely effectiveness, including refunds, to the latter. Perhaps discrimination may later be found in the allocation of cost between

some zones, but it would affect only the customers in those zones while the postponement of the interim order here would be of continuing detriment to all customers in all zones. Moreover, if decreased rates and resultant refunds are later found to be necessary in those isolated instances the Commission has the power to so order upon such finding and the individual lawful rates could at that time be fixed.

Moreover, the use of the interim order technique is in keeping with the purposes of the Act "to protect consumers against exploitation at the hands of natural gas companies . . . ," *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610 (1944), and "to underwrite just and reasonable rates to the consumers of natural gas . . . ." *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U. S. 378, 388 (1959). Faced with the finding that the rate of return was excessive, the Commission acted properly within its statutory power in issuing the interim order of reduction and refund, since the purpose of the Act is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. . . ." *Id.*, at p. 388. To do otherwise would have permitted Tennessee Gas to collect the illegal rate for an additional 18 months [8] at a cost of over $16,500,000 to consumers. True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they

[8] The cost allocation issue was decided 18 months following the Commission's decision on rate of return, and substantial issues on the cost-of-service question are still unresolved. If the interim order had not been entered the illegal rate would have been in effect 22 months, with an excessive return of some $20,000,000.

are due.[9] It is, therefore, the duty of the Commission to look at "the backdrop of the practical consequences [resulting] . . . and the purposes of the Act," *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n,* 364 U. S. 137, 147 (1960), in exercising its discretion under § 16 to issue interim orders and, where refunds are found due, to direct their payment at the earliest possible moment consistent with due process. In so doing under the circumstances here the Commission's ultimate action in directing the severance and in entering the interim order was not only entirely appropriate but in the best tradition of effective administrative practice.

The judgment of the Court of Appeals is reversed insofar as it set aside the interim order; otherwise it is affirmed.

Reversed in part.

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[9] In some of the States refunds due unfound former customers remain with the company in separate accounts subject to future order; a larger group escheats such amounts to the State; others permit them to be used in defraying the cost of the refund; a fourth group has no problem regarding transients since refunds are prorated among company customers and credited on future bills; and one State includes all refunds in future rate reductions. While refunds are permissible in cash, most of the States approve plans whereby credits are permitted on future gas bills in proportion to average consumption.

BURLINGTON TRUCK LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 27. Argued October 15–16, 1962.—Decided December 3, 1962.*

Because of a labor dispute, arrangements between nonunionized short-line motor carriers in Nebraska for the interchange of traffic with unionized trunk-line motor carriers for movement to and from points beyond Nebraska were disrupted by a union-induced boycott of such traffic under "hot cargo" clauses in contracts between the unions and the trunk-line carriers which protected the employees' right to refuse to handle "unfair goods." To meet this situation, the short-line carriers organized a corporation which applied to the Interstate Commerce Commission under § 207 (a) of the Interstate Commerce Act for authority to act as an interstate motor carrier. The Commission found that the union-induced boycott of the short-line carriers by the trunk-line carriers had resulted in serious inadequacies in the services available to a large section of the public, and it granted the applicant part of the operating authority requested. It made no findings to justify the choice of this remedy instead of other forms of relief under other sections of the Act. Four months later, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959, which at least raised serious questions as to the validity of the union-induced boycott. Subsequently, the District Court sustained the Commission's order as within the scope of its authority, based on adequate findings and supported by substantial evidence. *Held:* The judgment is reversed and the case is remanded to the District Court with instructions to set aside the Commission's order and remand the case to the Commission for further proceedings. Pp. 158–174.

1. The Commission's order must be set aside as an improvident exercise of its discretion as to the choice of remedies. Pp. 165–170.

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*Together with No. 28, *General Drivers & Helpers Union, Local 554, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,* v. *United States et al.*, also on appeal from the same Court.

(a) When, as here, the particular deviations from an otherwise completely adequate service (which has economic need for the traffic) consist solely of illegal and discriminatory refusals to accept or deliver traffic from or to particular carriers or shippers, the powers of the Commission under §§ 204, 212 and 216 bear heavily on the propriety of relief under § 207. Pp. 165–166.

(b) In such a case, the choice of the certification remedy may not be automatic; it must be rational and based upon conscious choice that, in the circumstances, the public interest in "adequate, economical, and efficient service" outbalances whatever public interest there is in protecting the revenues of existing carriers, in order to "foster sound economic conditions in transportation and among the several carriers," and the other opposing interests. Pp. 166–167.

(c) The Commission made no findings or analysis to justify its choice of remedies and gave no indication of the basis on which it exercised its expert discretion. Such adjudicatory practice is not acceptable to this Court nor permissible under the Administrative Procedure Act. Pp. 167–168.

(d) The Commission erred in disregarding the suggestion that the refusals of the trunk-line carriers to serve could be terminated through complaint procedures, thus obviating the need for additional service; and that error cannot now be justified on the ground that a cease-and-desist order would have been ineffective, since the Commission made no findings to support such a conclusion. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194. Pp. 168–169.

(e) Moreover, there was not substantial evidence of record upon which to base a finding that complaint procedures would have been ineffective, and there was every indication at the time that such procedures would have been effective under the law as it then stood. Pp. 169–170.

2. In view of the enactment of the Labor-Management Reporting and Disclosure Act of 1959, four months after the Commission's decision and over a year before the District Court handed down its decision, the District Court should not have affirmed the Commission's order; in the exercise of its discretion, it should have vacated the order and remanded the case to the Commission for further consideration in the light of changed circumstances. Pp. 171–172.

3. Upon remand, the Commission should be particularly careful in its choice of remedy (if any still be needed), because of the possible effects of its decision on the functioning of the national labor relations policy. Pp. 172–174.

194 F. Supp. 31, reversed and cause remanded.

David Axelrod argued the cause for appellants in No. 27. With him on the briefs were *Jack Goodman, Carl L. Steiner, Russell B. James, Starr Thomas* and *Roland J. Lehman.*

David D. Weinberg argued the cause and filed briefs for appellant in No. 28.

Robert W. Ginanne argued the cause for the United States et al., appellees. With him on the brief were *Solicitor General Cox, Assistant Attorney General Loevinger, J. William Doolittle, Robert B. Hummel, Elliott H. Moyer* and *I. K. Hay.*

J. Max Harding argued the cause for Nebraska Short Line Carriers, Inc., appellee. With him on the brief was *Robert A. Nelson.*

Mr. Justice White delivered the opinion of the Court.

These are direct appeals under 28 U. S. C. § 1253 from the judgment of a three-judge District Court, 194 F. Supp. 31 (S. D. Ill.), which upheld an order of the Interstate Commerce Commission, 79 M. C. C. 599, granting a motor common carrier application. This Court noted probable jurisdiction because of important questions raised as to the relationship and interplay between remedies available under the Interstate Commerce Act and under the National Labor Relations Act, as amended by the Labor Management Relations Act. 368 U. S. 951.

Appellee Nebraska Short Line Carriers, Inc., is a Nebraska corporation, organized in June 1956. All of its stock is owned by 12 motor carriers serving eastern and central Nebraska and interchanging interstate traffic at

Omaha and other gateway points with over 20 larger trunk-line carriers, among whom are the appellant carriers, with whom through-route, joint-rate, interline arrangements have been established. Some of the stockholder carriers serve Nebraska communities without other motor carrier or rail service.

For some time prior to May 1956, the stockholder carriers had resisted efforts by the Teamsters Union to unionize their operations. Eventually, the union sought to bring economic pressure to bear upon the stockholder carriers by a secondary boycott against their traffic through the larger, unionized, trunk-line carriers upon whom the stockholder carriers were dependent for interchanging traffic to and from points beyond Nebraska. The collective bargaining contract between the trunk-line carriers and the union contained protection of rights or so-called "hot cargo" clauses which reserved to the union and its members "the right to refuse to handle goods from or to any firm or truck" involved in any controversy with the union and provided that it should not be a cause for discharge if an employee of the carrier refused to handle "unfair" goods.[1]

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[1] The hot cargo clause provided, in pertinent part:

"It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from or to make pickups from, or deliveries to establishments where picket lines, strikes, walk-outs or lockouts exist.

"The term 'unfair goods' as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a con-

In May 1956, some of the stockholder carriers began experiencing difficulties in receiving and delivering freight from and to many of their normal and logical connections at Omaha and, to some extent, at Sioux City, Lincoln, and Grand Island. The difficulty consisted primarily of the refusal on the part of many of the larger carriers to accept interline traffic tendered to them by the stockholder carriers and the refusal to turn over to them inbound traffic routed over their lines or normally turned over to them for delivery to ultimate destinations in Nebraska. The stockholder carriers, shippers, and consignees thus experienced considerable delay, inconvenience, and unforeseen expense in the movement of traffic to and from interior Nebraska points. At the same time, however, some of the larger interlining carriers, particularly appellants Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, generally maintained normal interline relationships with the stockholder carriers.

The stockholder carriers thereupon organized Short Line and on June 22, 1956, Short Line filed an application with the Interstate Commerce Commission for common carrier authority to transport commodities on a regularly scheduled basis between certain Nebraska and Iowa points and points in other States. A further application for

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troversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.

. . . . .

"The insistence by any Employer that his employee[s] handle unfair goods or go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any need of the Union to go through the grievance procedure herein."

operating authority over irregular routes between Omaha and points in 32 different States was filed six months later. The applications were assigned to two different examiners, each of whom recommended that the application before him be denied. The Commission stated that "the pertinent facts are accurately and adequately stated" in the examiners' reports and adopted the statements as its own (79 M. C. C., at 605, 608), but it concluded that the first application should be granted in part.[2] The Commission found that although service in the area was satisfactory before May 1956, after that date the union-induced boycott of the stockholder carriers caused "a substantial disruption" and "serious inadequacies in the service available." 79 M. C. C., at 612, 613. Accordingly, it found that grant of Short Line's application was required by "the present and future public convenience and necessity." *Id.*, at 613. The Commission declared that it was not attempting to adjudicate a labor dispute or trench upon the jurisdiction of the National Labor Relations Board, and it conceded its lack of jurisdiction to look beyond the duties of carriers to the public under the terms of the Interstate Commerce Act. *Id.*, at 611. It strongly criticized the carrier appellants for yielding to union secondary boycott demands, however, and it declared that the carriers' failure to fulfill their duties as common carriers was particularly inexcusable since there had been no violence or imminent threats of danger to property or person. The Commission expressed the opinion that alleged "apprehensions of certain of the organized carriers that any opposition to the demands of the union would have resulted in reprisals against them" were "greatly exaggerated," and it noted that some of the interlining

[2] The grant was limited to an Omaha-Chicago and Omaha-Kansas City-St. Louis route, for traffic originating in or destined to Nebraska points. 79 M. C. C., at 606, 614. No appellate review has been sought for the denial of the second application.

carriers had successfully continued to deal with the stockholder carriers, with at least one of them encountering no difficulties with its employees when it changed its policy and carried out its statutory duties as a common carrier and interlined with the Short Line carriers.[3] *Id.*, at 612.

Finally, the Commission considered the remedy appropriate to the situation. Short Line had applied for operating authority under § 207 (certificates of public convenience and necessity). As the Commission noted, the Act provides other means of correcting deficiencies of service. Section 204 (c) empowers the Commission to order carriers to comply with the transportation laws, and the Commission may act upon complaint or upon its own motion without complaint, in each case after notice and hearing, and sanctions are available to enforce its orders;[4] § 212 (a) empowers the Commission to suspend certificates for failure to comply with duties under the Act. The Commission proceeded to dispose of the remedy problem in the following manner:

> "We do not agree with those of the parties who insist that the procedure here adopted; namely, the filing of the instant applications under the provisions of section 207 of the act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service

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[3] Apparently, in some instances it was necessary to handle interlined traffic by officials or supervisory personnel when employees refused to touch it. See R. 82.

[4] See §§ 212 (a) (revocation), 222 (a) (fine), 222 (b) (injunction). That the inadequacy in service involved here was first brought to the Commission's attention by appellee's application for a certificate in no way, of course, limited the agency's power to invoke §§ 204 (c), 212, 222.

> available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procuring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen." *Id.*, at 613.

The Commission therefore granted the application.[5]

The protesting carriers and the affected union sought judicial review before a three-judge District Court (28 U. S. C. §§ 1336, 1398, 2321–2325), which upheld the order as within the scope of the Commission's statutory

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[5] In this connection the Commission noted that it had refused a grant in a similar case decided concurrently with the present application (*Galveston Truck Line Corporation Extension*, 79 M. C. C. 619). The Commission stated that the circumstances there were different because the labor difficulties which had led to Commission issuance of a cease-and-desist order against carrier obedience to hot cargo clauses (*Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M. C. C. 617; see note 17, *infra*) had "ceased to exist for some time prior to the hearing, whereas in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing." 79 M. C. C., at 613. But approximately 21 months intervened between the examiner's report and the Commission's order, and over two years between hearings and order. During at least 18 months of this time the case appears to have been argued to the Commission, remaining on the docket pending decision. See 73 M. C. C., at 617, n. 1.

authority, based on adequate findings, and supported by substantial evidence. 194 F. Supp. 31. The court reviewed the evidence and concluded that although there was "no doubt that their [the protesting carriers'] ability to perform service prior to May 195[6] was adequate," the record showed that union pressure made it inadequate thereafter. 194 F. Supp., at 45. The court recognized that a cease-and-desist order might have been utilized, but stated that additional certification was also a permissible remedy which was not made unavailable merely because the reason for inadequacy of service was that "existing carriers [were] subordinating their public service obligations to their collective bargaining agreements." *Id.*, at 54.

In regard to the choice of remedy, the court rejected the contention that the passage of the Labor-Management Reporting and Disclosure Act of 1959, which added § 8 (e) to the National Labor Relations Act, as amended by the Labor Management Relations Act, 73 Stat. 543, 29 U. S. C. (Supp. III) § 158 (e), some four months after the entry of the order, mooted the case by making the union activities in inducing the organized carriers to boycott the Short Line stockholder carriers illegal and therefore unlikely to be resumed. The District Court expressed doubts as to whether § 8 (e) "effectively outlaws 'hot cargo' clauses," and maintained that, even if it did, the Commission's order should still stand. *Id.*, at 58. To the union's contention that grant of a certificate here injected the Interstate Commerce Commission into the province of the National Labor Relations Board, or at least undercut to some extent the policies of § 7 of the National Labor Relations Act, the court replied that the union's failure to organize the employees of the Short Line carriers "effectively destroyed any jurisdiction of the National Labor Relations Board under the Act of its cre-

ation." *Id.*, at 59.[6] The case is now before us on direct appeals from this judgment.

We have concluded that the judgment of the District Court must be reversed and the Commission's order set aside as an improvident exercise of its discretion. The Commission found from the facts of record that the refusals to handle interchange traffic and to accept freight from certain shippers[7] caused a substantial disruption in motor service and serious inadequacies in the service available, despite the efforts of some of the larger trunk-line carriers to maintain normal interline relationships. There was ample evidence to support these findings and we do not disturb them.

The difficulty with the order arises in connection with the findings and conclusions relevant to the choice of remedy. The assumption of the Commission was that the deficiencies of service made either of two remedies available—additional certification or entry of a cease-and-desist order—and that it had unlimited discretion to apply either remedy simply because either might be effective. It is unmistakably clear from the opinion of the Commission and from the fact-findings it made or adopted,[8] that the disruption in service resulted solely from refusals to serve, which in turn arose from union pressure applied to obtain union objectives. It is equally clear that absent union pressure there would have been no refusals to serve and that in such normal circumstances

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[6] Compare *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 471–472. But see National Labor Relations Act, §§ 2 (3), 9; Norris-LaGuardia Act, § 13 (c).

[7] There were findings that secondary boycotts were imposed not only against the stockholder carriers but against certain shippers who were engaged in their own labor disputes.

[8] The Commission adopted the statements of facts in both recommended reports. 79 M. C. C., at 605, 608.

the facilities and the services of the existing carriers were adequate.[9] Moreover, the trunk-line carriers were operating below capacity,[10] were in a position and anxious to transport additional traffic,[11] and had been enjoying the previously interlined traffic which the grant would divert to Short Line.[12] In this factual context we may put aside at the outset the authority which the appellees rely upon that holds that additional certification is the normal and permissible way to deal with generalized inadequacy in service. See, *e. g., Davidson Transfer Co.* v. *United States,* 42 F. Supp. 215, 219–220 (E. D. Pa.), aff'd, 317 U. S. 587.[13] When, as here, the particular deviations from an otherwise completely adequate service (which has economic need for the traffic) consist solely of illegal and discriminatory refusals to accept or deliver traffic from or to particular carriers or shippers, the powers of the Commission under §§ 204, 212, and 216 bear heavily on the propriety of § 207 relief. And in such a case the choice of the certification remedy may not be automatic;

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[9] R. 87–89, 95.

[10] R. 54.

[11] *Ibid.,* R. 95.

[12] R. 68–69.

[13] And see *Atchison, T. & S. F. R. Co.* v. *Reddish,* 368 U. S. 81, 91, where the Court rejected the argument that complaint proceedings must be resorted to before additional operating authority could be had to replace a common carrier service inadequate for the shippers' particularized physical or economic needs. This case, like the many cases appellees cite in which the Commission granted through-route certification to overcome inadequacy of existing joint-line service (*e. g., Penn Ohio New York Exp. Corp. Ext.—N. Y.,* 27 M. C. C. 269; *Malone Freight Lines, Inc., Ext.—Textiles,* 61 M. C. C. 501; *Dallas & Mavis Fwdg. Co. Ext.—Mont.,* 64 M. C. C. 511; *Braswell Ext.—Calif.,* 68 M. C. C. 664; *Kenosha Corp. Ext.—Kenosha,* 72 M. C. C. 289), is clearly inapposite here, where there is nothing inherently wrong with the appellant carriers' service, either because of its particular nature or because of lack of capacity, infrequency of pickups, delays in delivery, or the like.

it must be rational and based upon conscious choice that in the circumstances the public interest in "adequate, economical, and efficient service" outbalances whatever public interest there is in protecting existing carriers' revenues in order to "foster sound economic conditions in transportation and among the several carriers" (National Transportation Policy, 49 U. S. C. preceding §§ 1, 301, 901, 1001),[14] and the other opposing interests.

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act [15] will not permit us to accept such adjudicatory practice. See *Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 613–614. Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York* v. *United States,* 342 U. S. 882, 884 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Comm'n* v. *RCA Communications, Inc.,* 346 U. S. 86, 90. The Commission must exercise its discretion under § 207 (a) within the bounds expressed by the standard of "public convenience and necessity." Compare *id.,* at 91. And for the courts

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[14] In this connection it should be noted that certification of Short Line would divert traffic both from delinquent trunk-line carriers and from carriers who did not violate their duties by acceding to the secondary boycott, *e. g.,* Burlington and Santa Fe. See 79 M. C. C., at 603.

[15] Section 8 (b), 5 U. S. C. § 1007 (b), provides that all decisions shall "include a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Comm'n* v. *J–T Transport Co.,* 368 U. S. 81, 93; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 488–489; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 511. Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made. The Commission addressed itself neither to the possible shortcomings of § 204 procedures, to the advantages of certification, nor to the serious objections to the latter. As we shall presently show, these objections are particularly important in the present context and they should have been taken into account.

Appellants' position is and was that the refusals to serve could be terminated through complaint procedures and thus the need for additional service obviated. The Commission was, as indicated, unresponsive to these arguments in its order, deeming that the availability of the other remedy "[did] not alter the situation." This was error. Commission counsel now attempt to justify the Commission's "choice" of remedy on the ground that a cease-and-desist order would have been ineffective. The short answer to this attempted justification is that the Commission did not so find. *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194, 196. The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that

an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ." *Ibid.*

For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197), the administrative process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U. S., at 196.

The second and longer answer to the attempted justification is that there is not substantial evidence of record upon which to base a finding that a cease-and-desist order would have been ineffective. There was every indication at the time that a cease-and-desist order would render the deficiencies in service purely temporary phenomena and would thus be effective in promoting adequate, economical, and efficient service and in fostering sound economic conditions among the carriers affected.

It is said that attempted compliance by the unionized carriers might in some way "so aggravate their labor difficulties as to cause a complete cessation of operations." But this ignores the Commission's conclusion that carrier apprehensions of teamster reprisals were exaggerated and unwarranted. It further ignores the fact that, as the Commission was aware, the National Labor Relations Board

had ordered the union to cease boycotting any of the stockholder carriers by appeals to the employees of any other carrier. *International Brotherhood of Teamsters, Local 554,* 116 N. L. R. B. 1891. To be sure, the Board had not ordered the union not to make appeals directly to the trunk-line carriers. The union was free to make such appeals, absent inducement of employees, and, as far as the labor laws and the collective agreement [16] were concerned, the employer was free to reject or accede to such requests. But it was precisely at this point that the *Sand Door* case (*Local 1976* v. *Labor Board,* 357 U. S. 93) recognized the power of the Commission to enter cease-and-desist orders against the carriers' violating the transportation law and their tariffs.[17] Thus, as the appellant union argues,[18] there was no reason to have assumed that the ordinary processes of the law [19] were incapable of remedying the situation.[20]

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[16] See note 1, *supra,* setting forth the relevant provisions, under which the employees reserved the right to refuse to handle hot cargo, but under which the employer was left to his own devices. Cf. note 3, *supra.*

[17] The Court cited with approval the first *Galveston* case (*Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.,* 73 M. C. C. 617), in which the Commission entered a cease-and-desist order against carrier obedience to hot cargo clauses. 357 U. S., at 109–110.

[18] The union contends in its brief and we agree that the § 212 (a) complaint procedure, if followed by the stockholder carriers, "would have provided a more adequate remedy" at the time the case was before the Commission in 1956–1959.

[19] It is further contended, but we need not consider it here, that the efficacy of a cease-and-desist order is severely limited by the agency's self-imposed limitation against ordering carriers to cease from discriminatorily refusing to interline at joint rates. But cf. *Dixie Carriers, Inc.,* v. *United States,* 351 U. S. 56; *Interstate Commerce Comm'n* v. *Mechling,* 330 U. S. 567. The Commission did not find, nor could it have found on this record, that the protesting carriers were likely to refuse to interline with the stockholder carriers except at discriminatorily higher, combination rates.

[*Footnote 20 is on p. 171*]

But discussion of the effectiveness of cease-and-desist orders in terms of the June 1959 status of hot cargo arrangements is now largely academic: Congress added § 8 (e) to the Act four months after the Commission's decision in this case and over a year before the District Court sustained the Commission. Under this section Congress declared it to "be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ." In the absence of authoritative judicial interpretation of § 8 (e), however, the District Court was unwilling to attach any significance to the new law in the present case. In this the District Court erred. The plain words of the statute at the very least raised serious questions about the legality of direct union-employer agreements to boycott another employer. Not only would the delinquent interlining carriers in this case be subject to the injunctive and other processes of the National Labor Relations Board if their conduct violated

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[20] We do not imply that service deficiencies of the kind found in this record could never justify the issuance of permanent operating authority. A totally different case might be presented if other remedial action by the Commission and the Board proved fruitless, hopelessly time-consuming, or otherwise inadequate to terminate the interruptions in service. Nor do we intend to pass upon the Commission's discretion under § 210a to provide temporary authority, pending determination of an application for authority or cease-and-desist order, or as an alternative to permanent authority to remedy service deficiencies of the kind present here. See *Pan-Atlantic S. S. Corp.* v. *Atlantic Coast Line R. Co.*, 353 U. S. 436.

§ 8 (e), but the unions themselves would be vulnerable [21] and the pressures which generated the refusals to serve might well be effectively removed. These intervening facts so changed the complexion of the case that (even putting aside the considerations discussed above) the reviewing equity court, in the exercise of its sound discretion, should not have affirmed the order, as it did, but should have vacated it and remanded it to the Commission for further consideration in the light of the changed conditions. See *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 373–374; *Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126, 130–131; *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503, 506–509.[22]

Finally, although we do not wish to fetter the Commission's expert, discretionary powers by specifically prescribing that cease-and-desist order relief be granted (if, indeed, any relief is still needed) rather than additional certification, nevertheless the Commission should be particularly careful in its choice of remedy, and should have been particularly careful, because of the possible effects of its decision on the functioning of the national labor relations policy. The Commission acts in a most delicate area here, because whatever it does affirmatively (whether it grants a certificate or enters a cease-and-desist order) may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

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[21] For the view of the National Labor Relations Board, see *Amalgamated Lithographers of America (Ind.)*, 130 N. L. R. B. 985; *Amalgamated Lithographers of America*, 130 N. L. R. B. 968, aff'd, 301 F. 2d 20 (C. A. 5th Cir.); *American Feed Co.*, 129 N. L. R. B. 321.

[22] This was, of course, the District Court's, and not the Commission's, error.

Writing before the 1959 amendments to the labor law, this Court said in the *Sand Door* case:

> "But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods of a shipper. . . . But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes." 357 U. S., at 110.

The Court concluded that although "common factors may emerge in the adjudication of these questions" under the two Acts by the two different agencies, nevertheless independent consideration and resolution were possible, the National Labor Relations Board directing itself to consideration of whether the employees violated their duties under § 8 (b) and the Interstate Commerce Commission directing its attention to whether the carrier "may have failed in his obligations under the Interstate Commerce Act."

Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy as to transportation or labor relations. In such a context, choice of the sweeping relief of certification rather than the more precise and narrowly

drawn cease-and-desist order remedy was improvident, absent a compelling justification. And the fact that § 8 (e) of the Act now exposes the employer as well as the union to Labor Board injunctive processes only underlines the necessity for careful analysis in fashioning a remedy to terminate unlawful action by delinquent carriers. This is not to say that circumstances can never permit the Commission to authorize additional service to remedy refusals to serve, but the Commission must act with a discriminating awareness of the consequences of its action. It has not done so here.

The judgment of the District Court is reversed. The case is remanded to it with instructions to enter an order enjoining, annulling, and setting aside the order of the Interstate Commerce Commission, and remanding the case to the Commission for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I concur in the Court's judgment setting aside the Commission's order granting a permanent certificate to a new carrier to compete with existing carriers who but for temporary interruptions caused by lawful labor union activities would adequately meet the needs of commerce. I do not concur, however, in the remand to the Commission for further proceedings. Congress has vested power to regulate the employer-employee relationship in the National Labor Relations Board, not in the Interstate Commerce Commission, and I think the Commission's grant of a permanent certificate here, which stems wholly from temporary transportation delays owing to a labor dispute within the Labor Board's jurisdiction and which in effect punishes carriers for honoring their then lawful

collective bargaining contracts, amounts to an impermissible encroachment on that Board's domain. We are not called upon at this time to decide whether the Commission is wholly without power under any and all circumstances to grant temporary relief from a temporary stoppage of commerce in order to remedy acute emergency situations such, for illustration, as a shortage of food or supplies urgently needed in particular localities. It will be time enough to decide what are the powers of the Commission to meet such situations when they arise; it is conceded that they are not presented in this case.

Since it is my view that under the facts here the Commission has no power to grant a permanent certificate to a competitor, I see no reason to direct that this matter be referred back to the Commission for further proceedings. Such a remand assumes that there is some further action by way of a cease-and-desist order the Commission can or should take. My view is that the facts in this record provide no possible basis for permitting the Commission to order the carriers to cease and desist from carrying out their agreement with the unions. Nothing in the Interstate Commerce Act gives the Commission power to prohibit carriers or unions under the circumstances shown by this record from doing that which the Labor Act permits them to do. Moreover, as the Court points out, four months after the Commission's order Congress outlawed the kind of conduct which here interfered with transportation. Since Congress has, by this enactment, so clearly taken this matter in hand in a way that does not rely for enforcement on the Interstate Commerce Commission, the old Commission proceedings have all the earmarks of mootness, whether technically moot or not. If the union or the truck lines should hereafter violate this new law the Labor Board, backed by the courts, is vested with ample power to force both carriers and unions to obey that law.

The Interstate Commerce Commission has enough to do within its congressionally appointed field without stepping over into the field of labor regulation. The Commission should no more than a State* invade regulatory territory Congress has preempted for agencies of its own choice.

MR. JUSTICE CLARK, concurring in the result.

Four months after entry of the Commission's order Congress enacted § 8 (e) as an amendment to the National Labor Relations Act, 29 U. S. C. (Supp. III) § 158 (e). Since the language of that section raised serious questions as to the legality of the unions' "hot cargo" pressures, which in turn raised questions as to any continuation of the "substantial disruption" in service, it appears to me that the District Court should have vacated the order and remanded the case to the Commission for reconsideration in light of the likelihood of changed circumstances. The grant of permanent certification to a new carrier in an area where there are existing certifications is a drastic remedy to which resort should not be made except in the most compelling circumstances.

For this reason I concur in the Court's reversal and remand to the District Court. In view of the lapse of time and the fact that the conduct which caused the disruption of service has been outlawed† by Congress, however, it appears that the issue has been mooted, and the Commission may determine that further proceedings would serve no purpose.

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*Cf. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

†Although the effectiveness of the § 8 (e) ban on "hot cargo" clauses may have been subject to doubt when the District Court adjudicated this case, subsequent cases tend to remove any such doubt. See, *e. g.*, *Labor Board* v. *Local 294, International Brotherhood of Teamsters*, 298 F. 2d 105 (C. A. 2d Cir. 1961).

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, concurring.

I join in the opinion and add only a few words to state my conviction that the "discriminating awareness of the consequences of its action" required of the Commission by the opinion, inevitably must lead, if any relief is now warranted (which I doubt), to a rejection of the remedy of additional certification in favor of an appropriately limited cease-and-desist order.

As the matter was presented to the Commission and to the District Court, the additional certification, as the facts here plainly demonstrate, involved the Commission in intervention in the underlying labor dispute to a degree unduly trenching upon the Labor Board's jurisdiction and the rights and duties of the affected parties. Most certainly after the 1959 amendments to the labor law, the Commission, had the case then been remanded to it by the District Court as it should have been, could have entered a cease-and-desist order under which no conflict could or would have arisen between the I. C. C. and the N. L. R. B. in the respective exercise of their powers and in the discharge of their responsibilities. Such a cease-and-desist order should have been appropriately limited to requiring the carriers to provide service in a manner and to the extent compatible with their labor agreements and with both the carriers' and the union's rights and duties under federal labor law. That such an order would have been sufficient in practical effect is demonstrated by the fact that both Burlington and Santa Fe, parties to the hot cargo agreements, were able to carry out their duties under the Motor Carrier Act without creating any serious problems under their union agreements or under the National Labor Relations Act. This being so in the absence of a cease-and-desist order, it is difficult to understand why entry of such an order against the carriers would have been ineffective.

FOMAN *v.* DAVIS, EXECUTRIX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 41. Argued November 14, 1962.—Decided December 3, 1962.

A Federal District Court dismissed petitioner's complaint in a civil action for failure to state a claim upon which relief might be granted. Petitioner promptly moved to vacate the judgment and amend the complaint so as to state an alternative theory for recovery. Before the Court ruled on those motions, petitioner filed notice of appeal from the judgment of dismissal. Subsequently, the District Court denied the motions to vacate the judgment and to amend the complaint, and petitioner filed notice of appeal from that denial. On appeal, the parties briefed and argued the merits of both the dismissal of the complaint and the denial of petitioner's motions. The Court of Appeals treated the first notice of appeal as premature, because of the then pending motion to vacate, and it dismissed that appeal. It held that the second notice of appeal was ineffective to review the judgment of dismissal, because it failed to specify that the appeal was from that judgment, and it affirmed denial of petitioner's motions, on the ground that there was nothing in the record to support a finding that the District Court had abused its discretion in refusing to allow amendment of the complaint. *Held:*

1. On the record in this case, the Court of Appeals erred in narrowly reading the second notice of appeal as applying only to the denial of petitioner's motions, since petitioner's intention to seek review of both the dismissal of the complaint and the denial of her motions was manifest from the record as a whole. Pp. 181–182.

2. The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment of dismissal in order to allow amendment of the complaint, since it appears from the record that the amendment would have done no more than state an alternative theory of recovery, Federal Rule of Civil Procedure 15 (a) declares that leave to amend "shall be freely given when justice so requires," and denial of the motion without any apparent justifying reason was an abuse of discretion. P. 182.

292 F. 2d 85, reversed.

Milton Bordwin argued the cause and filed briefs for petitioner.

Roland E. Shaine argued the cause for respondent. With him on the briefs was *Richard R. Caples.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Petitioner filed a complaint in the District Court alleging that, in exchange for petitioner's promise to care for and support her mother, petitioner's father had agreed not to make a will, thereby assuring petitioner of an intestate share of the father's estate; it was further alleged that petitioner had fully performed her obligations under the oral agreement, but that contrary thereto the father had devised his property to respondent, his second wife and executrix. Petitioner sought recovery of what would have been her intestate share of the father's estate. Respondent moved to dismiss the complaint on the ground that the oral agreement was unenforceable under the applicable state statute of frauds. Accepting respondent's contention, the District Court entered judgment on December 19, 1960, dismissing petitioner's complaint for failure to state a claim upon which relief might be granted. On December 20, 1960, petitioner filed motions to vacate the judgment and to amend the complaint to assert a right of recovery in *quantum meruit* for performance of the obligations which were the consideration for the assertedly unenforceable oral contract. On January 17, 1961, petitioner filed a notice of appeal from the judgment of December 19, 1960. On January 23, 1961, the District Court denied petitioner's motions to vacate the judgment and to amend the complaint. On January 26, 1961, petitioner filed a notice of appeal from denial of the motions.

On appeal, the parties briefed and argued the merits of dismissal of the complaint and denial of petitioner's

motions by the District Court. Notwithstanding, the Court of Appeals of its own accord dismissed the appeal insofar as taken from the District Court judgment of December 19, 1960, and affirmed the orders of the District Court entered January 23, 1961. 292 F. 2d 85. This Court granted certiorari. 368 U. S. 951.

The Court of Appeals reasoned that in the absence of a specific designation of the provision of the Federal Rules of Civil Procedure under which the December 20, 1960, motion to vacate was filed, the motion would be treated as filed pursuant to Rule 59 (e), rather than under Rule 60 (b);[1] since, under Rule 73 (a),[2] a motion under Rule 59 suspends the running of time within which an appeal may be perfected, the first notice of appeal was treated as premature in view of the then pending motion to vacate and of no effect. The Court of Appeals held the second notice of appeal, filed January 26, 1961, ineffective to review the December 19, 1960, judgment dismissing the complaint because the notice failed to specify that the appeal was being taken from that judgment as well as

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[1] Rule 59 (e) provides:
"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60 (b) provides in relevant part:
"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . ."

[2] Rule 73 (a) provides in relevant part:
"The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules . . . granting or denying a motion under Rule 59 to alter or amend the judgment . . . ."

from the orders denying the motions. Considering the second notice of appeal, therefore, only as an appeal from the denial by the District Court of the motions to vacate and amend, the Court of Appeals held that there was nothing in the record to show the circumstances which were before the District Court for consideration in ruling on those motions; consequently it regarded itself as precluded from finding any abuse of discretion in the refusal of the court below to allow amendment.

The Court of Appeals' treatment of the motion to vacate as one under Rule 59 (e) was permissible, at least as an original matter, and we will accept that characterization here. Even if this made the first notice of appeal premature, we must nonetheless reverse for we believe the Court of Appeals to have been in error in so narrowly reading the second notice.

The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal.

It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by

counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Rule 15 (a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Separate memorandum of MR. JUSTICE HARLAN, in which MR. JUSTICE WHITE joins.

I agree with the Court as to the dismissal of petitioner's appeal by the Court of Appeals. However, as to her motion to vacate the order of the District Court and for leave to amend the complaint, I believe such matters are best left with the Courts of Appeals, and I would dismiss the writ of certiorari, in that respect, as improvidently granted.

PENSICK & GORDON, INC., *v.* CALIFORNIA MOTOR EXPRESS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 222. Decided December 3, 1962.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 302 F. 2d 391.

Carl M. Gould for petitioner.

Theodore W. Russell, George L. Catlin and *Joseph P. Loeb* for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., ante,* p. 84.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would affirm the judgment below for the reasons given in the dissenting opinion in *Hewitt-Robins.*

LEE *v.* PEEK ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 426. Decided December 3, 1962.

Appeal dismissed and certiorari denied.
Reported below: 240 S. C. 203, 125 S. E. 2d 353.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BUCKLES ET AL. *v.* PEOPLES GAS LIGHT & COKE CO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 442. Decided December 3, 1962.

Appeal dismissed and certiorari denied.
Reported below: 24 Ill. 2d 520, 182 N. E. 2d 169.

Stanley B. Balbach for appellants.

Clarence H. Ross for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

STONYBROOK, INC., *v.* CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 470. Decided December 3, 1962.

Appeal dismissed and certiorari denied.
Reported below: 149 Conn. 492, 181 A. 2d 601.

Francis M. Shea, Lawrence J. Latto, Alfred L. Scanlan and *Richard T. Conway* for appellant.

James J. O'Connell for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

AHOYIAN ET AL. *v.* MASSACHUSETTS TURNPIKE AUTHORITY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 473. Decided December 3, 1962.

211 F. Supp. 668, affirmed.

J. Fleet Cowden for appellants.

Edward O. Proctor, Arthur E. Sutherland and *Kevin Hern* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

NAPIER *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 452, Misc. Decided December 3, 1962.

Appeal dismissed and certiorari denied.
Reported below: 298 F. 2d 445.

Appellant *pro se.*

Solicitor General Cox for the United States et al.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

FORD *v.* FORD.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 63. Argued November 15, 1962.—Decided December 10, 1962.

After being informed that a husband and his estranged wife had reached an agreement concerning the custody of their children, a Virginia court dismissed a petition for habeas corpus which had been filed by the husband in order to obtain their custody. Subsequently, while the children were with their mother in South Carolina, she sued in a court of that State to have full custody awarded to her, and that was done in a proceeding in which the husband appeared and contended that it was a violation of the agreement reached in Virginia which was the basis of the Virginia court's order of dismissal. The Supreme Court of South Carolina reversed, on the ground that the judgment of the Virginia court was *res judicata* and binding on the South Carolina courts under the Full Faith and Credit Clause of the Federal Constitution, in the absence of a change of circumstances warranting a change of the custody of the children. *Held:* Even if the Full Faith and Credit Clause is applicable to cases involving custody of children, the courts of South Carolina were not bound by the Virginia order of dismissal here, since that order was not *res judicata* in Virginia. Pp. 187–194.

239 S. C. 305, 123 S. E. 2d 33, reversed.

W. Francis Marion argued the cause for petitioner. With him on the briefs was *O. G. Calhoun.*

Wesley M. Walker argued the cause for respondent. With him on the briefs were *John S. Davenport III* and *Angus H. Macaulay, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a controversy between a husband and wife over the custody of their three young children which raises questions under the Full Faith and Credit Clause of the

United States Constitution.[1] Their first litigation was in 1959 when the husband filed in the Richmond Virginia Law and Equity Court a petition for habeas corpus alleging that the wife had the children but was not a suitable person to keep them and asking that they be produced before the court and custody awarded to him. The wife promptly answered, alleging that she was the proper person to have custody of the children and asking that the writ be dismissed. Thereafter negotiations took place between the parents, both being represented by counsel, and they agreed that the husband was, with minor exceptions, to have custody of the children during the school year and the wife was to have custody during summer vacation and other holidays. When notified of this agreement, the Richmond court entered the following order:

> "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed."

Some nine months later, August 10, 1960, while the three children were with their mother in Greenville, South Carolina, she began this suit for full custody in the Greenville County Juvenile and Domestic Relations Court, again alleging that she was the proper person to have custody and that the husband was not. Service was had upon the husband, who answered, charging that for

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[1] U. S. Const., Art. IV, § 1, states:
"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The statute passed under this authority is found at 28 U. S. C. § 1738.

reasons set out the mother was not fit to have custody of the children and asserting that he was. He also set up as a defense that

> ". . . Plaintiff has violated and breached the agreement made between the parties by and with their respective legal counsel and further violated the Order of the Court of record in Richmond, Virginia that was duly issued and based upon said agreement."

After hearing testimony from 11 witnesses including the husband and wife, the trial judge found as a fact that while both the father and mother were fit persons to have the children, it was "to the best interest of the children that the mother have custody and control." The judge also rejected the husband's argument that the order of dismissal in the Virginia court should be treated as *res judicata* of the issue of fitness before the South Carolina court.

On appeal the Court of Common Pleas, like the judge of the juvenile court, held that under the law of South Carolina the interests of the children were "paramount" and that it was their welfare which had to be protected. It decided that, while both parents would be suitable custodians, the best interests of the children required that the wife have custody during the school months and the husband during the other parts of the year, in effect inverting the arrangement previously made in the parents' agreement. In rejecting the husband's contention that South Carolina courts should be bound by the dismissal of the habeas corpus proceedings in Virginia which was based on the parents' agreement, the court said:

> "To hold that the custody of these three children was fully and finally determined in Richmond, Virginia, by the agreement reached between the plain-

> tiff's attorneys and the defendant's attorneys would be unfair to the children and too harsh a rule to follow."

On appeal the Supreme Court of South Carolina reversed. 239 S. C. 305, 123 S. E. 2d 33 (1961). That court, after a review of certain Virginia cases, said:

> "If the respondent [the wife] here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or usage' the Courts of Virginia would give to such order or judgment." 239 S. C., at 317, 123 S. E. 2d, at 39.

We granted certiorari to consider this question of full faith and credit upon which the South Carolina Supreme Court's judgment rests. 369 U. S. 801 (1962).

The husband has argued that we need not reach the full faith and credit question because the State Supreme Court rested its decision on South Carolina law rather than on the Full Faith and Credit Clause of the Federal Constitution. This argument is based on language in the closing part of the court's opinion, where it was said that "A judicial award of the custody of a child is never final" and that a South Carolina court may "even on its own motion" reconsider the custody of a child if new facts and circumstances make it necessary or desirable for the child's welfare to do so. The court concluded, however, that it found in the pleadings and the record "neither allegation

nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action." 239 S. C., at 317–318, 123 S. E. 2d, at 39. It seems clear to us that the State Supreme Court was merely stating that under its own law it could modify custody decrees if the circumstances had changed.[2] It seems equally clear to us that the court was not attempting to rely on South Carolina law for its conclusion that, since there were no changed circumstances, it had to give effect to the prior Virginia decree. In previously stating the issue submitted in the case, the court had said this:

> "It was further submitted that the Juvenile and Domestic Relations Court of Greenville County must recognize, in accordance with the full faith and credit clause of the Constitution of the United States, the agreed Order of Dismissal of the Virginia Court and that such was *res judicata,* unless there was evidence of subsequent misconduct on the part of the appellant or a change of conditions warranting a change of the custody of the children." 239 S. C., at 309, 123 S. E. 2d, at 34–35.

What the court then went on to discuss was not whether the Virginia decree was *res judicata* under South Carolina law but whether it was *res judicata* under Virginia law and therefore entitled to full faith and credit in South Carolina. We are convinced that the court rested its decision squarely and solely on its reading of Virginia law and of the Full Faith and Credit Clause as requiring South Carolina, in the absence of a change of circumstances, to give full effect to the prior Virginia decree. Nothing in the court's opinion suggests what it might have

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[2] We have held that a court in one State can so modify a custody decree made in another State. *New York ex rel. Halvey* v. *Halvey,* 330 U. S. 610 (1947).

done under South Carolina law had it not so interpreted the Full Faith and Credit Clause.

Whether the South Carolina court's interpretation of the Full Faith and Credit Clause is a correct one is a question we have previously reserved.[3] We need not reach that question here. The Full Faith and Credit Clause, if applicable to a custody decree, would require South Carolina to recognize the Virginia order as binding only if a Virginia court would be bound by it. Recognizing this, the South Carolina Supreme Court's opinion was largely devoted to a review of Virginia cases to determine the effect in Virginia of the order of dismissal. The cases relied on by the South Carolina court do hold that the parties to some actions may agree to a dismissal and that in such cases a "dismissed agreed" order is *res judicata* between the parties. All of the Virginia cases discussed by the South Carolina court, however, involved purely private controversies[4] which private litigants can settle, and none involved the custody of children where the public interest is strong. In each case the Virginia dismissal was the result of an agreement between the parties equivalent to a compromise intended to settle a cause of action.[5] Whatever the effect given such dismissals where only private interests of parties are involved, cases involving custody of children raise very different considerations. We are of the opinion that Virginia law, which

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[3] *Kovacs* v. *Brewer*, 356 U. S. 604, 607 (1958); *New York ex rel. Halvey* v. *Halvey*, 330 U. S. 610, 615–616 (1947).

[4] *Murden* v. *Wilbert*, 189 Va. 358, 53 S. E. 2d 42 (1949) (negligence action arising out of automobile accident); *Hinton* v. *Norfolk & W. R. Co.*, 137 Va. 605, 120 S. E. 135 (1923) (personal injury suit); *Bardach Iron & Steel Co.* v. *Tenenbaum*, 136 Va. 163, 118 S. E. 502 (1923) (seller's suit for buyer's breach of contract).

[5] *Ibid.* In a fourth case mentioned in the South Carolina opinion, *Virginia Concrete Co.* v. *Board of Supervisors*, 197 Va. 821, 91 S. E. 2d 415 (1956), the dismissal was at the motion of plaintiff's counsel and was "with prejudice."

does not treat a contract between the parents as a bar to the court's jurisdiction in custody cases,[6] would similarly not treat as *res judicata* the dismissal in this case.

The Virginia court held no hearings as to the custody of the children. In entering its order of dismissal, the court neither examined the terms of the parents' agreement nor exercised its own judgment of what was best for the children. The court's order meant no more than that the parents had made an agreement between themselves. Virginia law, like that of probably every State in the Union,[7] requires the court to put the child's interest first. The Supreme Court of Appeals of Virginia has stated this policy with unmistakable clarity:

> "In Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate." *Mullen* v. *Mullen,* 188 Va. 259, 269, 49 S. E. 2d 349, 354 (1948).

Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice. In Virginia, the parents cannot make agreements which will bind courts to decide a custody case one way or the other. The Virginia Supreme Court of Appeals has emphasized this deep-rooted Virginia policy by declaring: "The custody and welfare of children are not the subject of barter." *Buchanan* v. *Buchanan,* 170 Va. 458, 477, 197 S. E. 426, 434 (1938).

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[6] *Gloth* v. *Gloth,* 154 Va. 511, 551, 153 S. E. 879, 892 (1930).

[7] See 17A Am. Jur., Divorce and Separation, § 818 (1957) and cases there collected.

Whatever a Virginia court might do in a case where another court had exercised its considered judgment before awarding custody,[8] we do not believe that, in view of Virginia's strong policy of safeguarding the welfare of the child, a court of that State would consider itself bound by a mere order of dismissal where, as here, the trial judge never even saw, much less passed upon, the parents' private agreement for custody and heard no testimony whatever upon which to base a judgment as to what would be best for the children.

We hold that the courts of South Carolina were not precluded by the Full Faith and Credit Clause from determining the best interest of these children and entering a decree accordingly. In holding otherwise, the South Carolina Supreme Court was in error. The case is reversed and remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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[8] A custody decree entered by a Virginia court "ordinarily" will not be altered in the absence of changed circumstances. *E. g., Collins* v. *Collins,* 183 Va. 408, 32 S. E. 2d 657 (1945); *Darnell* v. *Barker,* 179 Va. 86, 18 S. E. 2d 271 (1942). Even where there is such a decree, it is arguable that Virginia courts do in fact make *de novo* reviews of the correctness of the original decrees. See *Semmes* v. *Semmes,* 201 Va. 117, 109 S. E. 2d 545 (1959); *Andrews* v. *Geyer,* 200 Va. 107, 104 S. E. 2d 747 (1958).

SMITH *v.* EVENING NEWS ASSOCIATION.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 13. Argued October 10, 1962.—Decided December 10, 1962.

An employee brought suit in a state court against his employer, seeking damages for breach of a collective bargaining contract between his union and the employer. He alleged that the employer had violated a clause in the contract prohibiting discrimination against any employee because of his membership or activity in the union. It was conceded that such conduct would constitute an unfair labor practice prohibited by § 8 of the National Labor Relations Act. *Held:* The suit could be maintained by an individual employee, and the state court's jurisdiction was not pre-empted under the rule of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236. Pp. 195–201.

362 Mich. 350, 106 N. W. 2d 785, reversed.

Thomas E. Harris argued the cause and filed briefs for petitioner.

Philip T. Van Zile II argued the cause for respondent. With him on the briefs was *Clifford W. Van Blarcom.*

By invitation of the Court, 369 U. S. 827, *Solicitor General Cox* filed briefs for the United States, as *amicus curiae,* urging reversal. With him on the briefs were *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner is a building maintenance employee of respondent Evening News Association, a newspaper publisher engaged in interstate commerce, and is a member of the Newspaper Guild of Detroit, a labor organization having a collective bargaining contract with respondent. Petitioner, individually and as assignee of 49 other similar employees who were also Guild members, sued respondent for breach of contract in the Circuit Court of

Wayne County, Michigan.[1] The complaint stated that in December 1955 and January 1956 other employees of respondent, belonging to another union, were on strike and respondent did not permit petitioner and his assignors to report to their regular shifts, although they were ready, able and available for work.[2] During the same period, however, employees of the editorial, advertising and business departments, not covered by collective bargaining agreements, were permitted to report for work and were paid full wages even though there was no work available. Respondent's refusal to pay full wages to petitioner and his assignors while paying the nonunion employees, the complaint asserted, violated a clause in the contract providing that "there shall be no discrimination against any employee because of his membership or activity in the Guild."

The trial court sustained respondent's motion to dismiss for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the National Labor Relations Act and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board. The Michigan Supreme Court affirmed, 362 Mich. 350, 106 N. W. 2d 785, relying upon *San Diego Trades Council* v. *Garmon*, 359 U. S. 236, and like pre-emption cases.[3] Certiorari was granted, 369 U. S. 827, after the decisions of this Court in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, and *Dowd Box Co.* v. *Courtney*, 368 U. S. 502.

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[1] There was no grievance arbitration procedure in this contract which had to be exhausted before recourse could be had to the courts. Compare *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238; *Drake Bakeries Inc.* v. *Local 50, American Bakery Workers*, 370 U. S. 254.

[2] A small number of these employees were permitted to do some work during the strike.

[3] *Garner* v. *Teamsters Union*, 346 U. S. 485; *Weber* v. *Anheuser-Busch*, 348 U. S. 468.

Lucas Flour and *Dowd Box*, as well as the later *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, were suits upon collective bargaining contracts brought or held to arise under § 301 of the Labor Management Relations Act [4] and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the National Labor Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the pre-emption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board.[5] The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts

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[4] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations Act, § 301 (a), 29 U. S. C. § 185 (a).

[5] "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." National Labor Relations Act, § 8 (a) (3), 29 U. S. C. § 158 (a) (3). An unfair labor practice charge could have been filed under § 10, but that remedy was not pursued and the present proceeding was commenced after the six-month limitation period prescribed in § 10 (b) had expired.

which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them, in our view, and the National Labor Relations Board is in accord.[6]

We are left with respondent's claim that the predicate for escaping the *Garmon* rule is not present here because this action by an employee to collect wages in the form of damages is not among those "suits for violation of contracts between an employer and a labor organization . . . ," as provided in § 301. There is support for respondent's position in decisions of the Courts of Appeals,[7] and in *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U. S. 437, a majority of the Court in three separate opinions concluded that § 301 did not give the federal courts jurisdiction over a suit brought by a union to enforce employee rights which were variously characterized as "peculiar in the individual benefit which is their subject matter," "uniquely personal" and arising "from separate hiring contracts between the employer and each employee." *Id.*, at 460, 461, 464.

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[6] The view of the National Labor Relations Board, made known to this Court in an *amicus curiae* brief filed by the Solicitor General, is that ousting the courts of jurisdiction under § 301 in this case would not only fail to promote, but would actually obstruct, the purposes of the Labor Management Relations Act.

The Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of the law. See, *e. g.*, *Consolidated Aircraft Corp.*, 47 N. L. R. B. 694; *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080.

[7] *E. g.*, *Local Lodge 2040, I. A. M.*, v. *Servel, Inc.*, 268 F. 2d 692 (C. A. 7th Cir.); *Copra* v. *Suro*, 236 F. 2d 107 (C. A. 1st Cir.); *United Protective Workers* v. *Ford Motor Co.*, 194 F. 2d 997 (C. A. 7th Cir.). See also *Dimeco* v. *Fisher*, 185 F. Supp. 213 (D. N. J.) and cases cited therein.

However, subsequent decisions here have removed the underpinnings of *Westinghouse* and its holding is no longer authoritative as a precedent. Three of the Justices in that case were driven to their conclusion because in their view § 301 was procedural only, not substantive, and therefore grave constitutional questions would be raised if § 301 was held to extend to the controversy there involved.[8] However, the same three Justices observed that if, contrary to their belief, "Congress has itself defined the law or authorized the federal courts to fashion the judicial rules governing this question, it would be self-defeating to limit the scope of the power of the federal courts to less than is necessary to accomplish this congressional aim." *Id.*, at 442. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, of course, has long since settled that § 301 has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts. There is no constitutional difficulty and § 301 is not to be given a narrow reading. *Id.*, at 456, 457. Section 301 has been applied to suits to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge, *Textile Workers* v. *Lincoln Mills, supra; General Electric Co.* v. *Local 205, UEW*, 353 U. S. 547; to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593; to recover wage increases in a contest over the validity of the collective bargaining contract, *Dowd Box Co.* v. *Courtney, supra;* and to suits against individual union members for violation of a

[8] Two other Justices, in a separate opinion, concluded that under § 301 a union as a party plaintiff may not enforce the wage claims of individual employees.

no-strike clause contained in a collective bargaining agreement. *Atkinson* v. *Sinclair Refining Co., supra.*

The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of unions. The word "between," it suggests, refers to "suits," not "contracts," and therefore only suits between unions and employers are within the purview of § 301. According to this view, suits by employees for breach of a collective bargaining contract would not arise under § 301 and would be governed by state law, if not pre-empted by *Garmon,* as this one would be, whereas a suit by a union for the same breach of the same contract would be a § 301 suit ruled by federal law. Neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretation, which would frustrate rather than serve the congressional policy expressed in that section. "The possibility that individual contract terms might have different meanings

under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters* v. *Lucas Flour Co., supra,* at 103.

We conclude that petitioner's action arises under § 301 and is not pre-empted under the *Garmon* rule.[9] The judgment of the Supreme Court of Michigan is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, dissenting.

I would affirm the Michigan Supreme Court's holding that Michigan courts are without jurisdiction to entertain suits by employees against their employers for damages measured by "back pay" based on discrimination, which discrimination § 8 (a) of the National Labor Relations Act makes an unfair labor practice and which § 10 (b) and (c) subject to the jurisdiction of the Labor Board with power after hearings to award "back pay." It is true that there have been expressions in recent cases which indicate that a suit for the violation of a collective bargaining contract may be brought in a state or federal court even though the conduct objected to was also arguably an unfair labor practice within the Labor Board's jurisdiction.[1] It seems clear to me that these expressions of

[9] The only part of the collective bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue here and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts.

[1] *Atkinson* v. *Sinclair Rfg. Co.,* 370 U. S. 238, 245, n. 5 (1962); *Local 174, Teamsters Union* v. *Lucas Flour Co.,* 369 U. S. 95, 101, n. 9 (1962); *Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 513 (1962).

opinion were not necessary to the decisions in those cases [2] and that neither these prior decisions nor § 301 of the Labor Management Relations Act requires us to hold that either employers or unions can be made to defend themselves against governmental regulation and sanctions of the same type for the same conduct by both courts and the Labor Board. Such duplication of governmental supervision over industrial relationships is bound to create the same undesirable confusion, conflicts, and burdensome proceedings that the National Labor Relations Act was designed to prevent, as we have interpreted that Act in prior cases like *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

One example is enough to show how Congress' policy of confining controversies over unfair labor practices to the Labor Board might well be frustrated by permitting unfair labor practice claimants to choose whether they will seek relief in the courts or before the Board. Section 10 (b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." In contrast, the statute of limitations in Michigan governing breach of contract suits like this is six years.[3] The Court's holding thus opens up a way to

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[2] *Atkinson* v. *Sinclair Rfg. Co.*, *supra*, note 1, involved a strike by union members over pay claims, in violation of an agreement to arbitrate grievances. *Local 174, Teamsters Union* v. *Lucas Flour Co.*, *supra*, note 1, concerned a strike by the union over the discharge of an employee, in violation of an agreement to arbitrate such disputes. *Dowd Box Co.* v. *Courtney*, *supra*, note 1, was an action by union officers against a company for failure to put into effect pay increases and vacation benefits provided in a collective bargaining agreement. In my view, none of the activities in any of these cases were even arguably unfair labor practices subject to the Labor Board's jurisdiction, and the Court did not suggest that they were.

[3] Mich. Comp. Laws, 1948, § 609.13.

defeat the congressional plan, adopted over vigorous minority objection, to expedite industrial peace by requiring that both the complaining party and the Board act promptly in the initiation of unfair labor practice proceedings.[4] Instead, by permitting suits like this one to be filed, it is now not only possible but highly probable that unfair labor practice disputes will hang on like festering sores that grow worse and worse with the years.[5] Of course this Court could later, by another major statutory surgical operation, apply the six-months Labor Board statute of limitations to actions for breach of collective bargaining contracts under § 301. But if such drastic changes are to be wrought in the Act that Congress passed, it seems important to me that this Court should wait for Congress to perform that operation.

There is another reason why I cannot agree with the Court's disposition of this case. In the last note on the last page of its opinion, the Court says:

> "The only part of the collective bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue here and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts."

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[4] Compare H. R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947) (majority view), with *id.*, at 90 (minority view).

[5] The Government suggests that these years be further extended by requiring that, when cases are brought in a court, questions within the Labor Board's competence shall be referred to the Board. Dividing into two what should be a single proceeding will result in a shuttling operation which prior experience shows might not be settled for a decade. See, *e. g.*, the protracted litigation which was finally concluded in *El Dorado Oil Works* v. *United States*, 328 U. S. 12 (1946).

Unless my reading of this note is wrong, the Court purports to reserve the question of whether an employee who has suffered the kind of damages here alleged arising from breach of a collective bargaining agreement can file a lawsuit for himself under § 301. Earlier in its opinion the Court decides that a claim for individual wages or back pay is within the subject-matter jurisdiction of courts under § 301, that is, that such a claim is of the type that the courts are empowered to determine. The Court then rejects respondent's argument that an individual employee can never under any circumstances bring a § 301 suit. But it seems to me that the Court studiously refrains from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a § 301 action and when he must step aside for the union to prosecute his claim. Nor does the Court decide whether the suit brought in this case is one of the types which an individual can bring. This puzzles me. This Court usually refrains from deciding important questions of federal law such as are involved in this case without first satisfying itself that the party raising those questions is entitled (has standing) to prosecute the case. It seems to me to be at least a slight deviation from the Court's normal practice to determine the law that would be applicable in a particular lawsuit while leaving open the question of whether such a lawsuit has even been brought in the particular case the court is deciding. This Court has not heretofore thought itself authorized to render advisory opinions. Moreover, I am wholly unable to agree that the right of these individuals to bring this lawsuit under § 301 was not argued here.

Finally, since the Court is deciding that this type of action can be brought to vindicate workers' rights, I think it should also decide clearly and unequivocally whether an employee injured by the discrimination of either his employer or his union can file and prosecute his

own lawsuit in his own way. I cannot believe that Congress intended by the National Labor Relations Act either as originally passed or as amended by § 301 to take away rights to sue which individuals have freely exercised in this country at least since the concept of due process of law became recognized as a guiding principle in our jurisprudence. And surely the Labor Act was not intended to relegate workers with lawsuits to the status of wards either of companies or of unions.

STOCK *v.* TERRENCE, STATE HOSPITAL DIRECTOR.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 437. Decided December 10, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 N. Y. 2d 362, 183 N. E. 2d 752.

Walter J. Holloran for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

SPAHOS ET AL. *v.* MAYOR OF SAVANNAH BEACH, TYBEE ISLAND, GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 474. Decided December 10, 1962.

207 F. Supp. 688, affirmed.

Aaron Kravitch and *Phyliss Kravitch* for appellants.

Anton F. Solms, Jr. for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

LEVER BROTHERS CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 487. Decided December 10, 1962.

Appeal dismissed.

Abe Fortas, William L. McGovern, Abe Krash and *Dennis G. Lyons* for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger and *Lionel Kestenbaum* for the United States, and *Richard W. Barrett* for Procter & Gamble Co. et al., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

SCHROEDER *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 75. Argued November 15, 1962.—Decided December 17, 1962.

Under the New York City Water Supply Act, the City instituted proceedings to acquire the right to divert a portion of a river some 25 miles upstream from appellant's summer home, which was on the bank of the river and was occupied only during the months of July and August each year. Although appellant's name and address could easily have been ascertained from deed records and tax rolls, no attempt was made to give notice to appellant except by publication in newspapers and by posting notices during the month of January on trees and poles along the river. Alleging that she had no actual knowledge of the proceedings until after the statutory period for filing damage claims had expired, appellant sought redress in the New York courts. *Held:* In the circumstances of this case, the newspaper publications and posted notices did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires. Pp. 208–214.

10 N. Y. 2d 522, 180 N. E. 2d 568, reversed.

Louis B. Scheinman argued the cause and filed briefs for appellant.

Theodore R. Lee argued the cause for appellee. With him on the brief were *Leo A. Larkin* and *Seymour B. Quel.*

Briefs of *amici curiae,* urging reversal, were filed by *Benjamin M. Goldstein* for Goldstein & Goldstein et al. and by *Osmond K. Fraenkel* for the New York Civil Liberties Union.

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented by this case is whether the City of New York deprived the appellant of due process of law by failing to give her adequate notice of condemnation proceedings affecting certain property she owned on the

Neversink River in Orange County, New York. The property in question consisted of a house and three and one-half acres of land, which the appellant and her family occupied only during the months of July and August each year.

In 1952 the city instituted a proceeding under the provisions of the New York City Water Supply Act [1] to acquire the right to divert a portion of the Neversink River at a point in Sullivan County, New York, some 25 miles upstream from the appellant's property. The Water Supply Act, which sets out the procedure to be followed by the New York Board of Water Supply in condemning land, easements, and rights affecting real property required for the New York City water system, provides that notice of such condemnation proceedings be given to affected landowners in the following manner:

> "The corporation counsel shall give notice in the City Record, and in two public newspapers published in the city of New York and in two public newspapers published in each other county in which any real estate laid out on such maps may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal . . . . Such notice shall be so published, once in each week, in each of such newspapers, for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected." [2]

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[1] Administrative Code of City of New York, Title K41.

[2] Administrative Code of City of New York, Title K41-8.0.

The Act further provides that all claims for damages resulting from the city's acquisition are barred after three years.[3]

Proceeding in accordance with the statute, the city caused notice of its acquisition of the right to divert the Neversink to be published the requisite number of times in the City Record of the City of New York, in two New York City newspapers, and in two newspapers published in Orange County, and in addition posted 22 notices on trees and poles along a seven- or eight-mile stretch of the river in the general vicinity of the appellant's premises. No notice was posted anywhere on the appellant's property itself. The two Orange County newspapers in which publication was made were published in small communities many miles from the appellant's property, although at the time there were newspapers being published in larger Orange County towns nearby. The notices were posted on the trees and poles during the month of January, when the appellant's premises were vacant. Although the appellant's name and address were readily ascertainable from both deed records and tax rolls, neither the newspaper publications nor the posted notices contained the name of the appellant or of any other affected property owner. Neither the newspaper publications nor the posted notices explained what action a property owner might take to recover for damages caused by the city's acquisition, nor did they intimate any time limit upon the filing of a claim by an affected property owner.

The appellant did not file a claim for damages to her property within the three-year period prescribed by the Water Supply Act. In January 1960, however, she brought the present equitable action in a New York trial court. Her complaint alleged that she had never been notified of the condemnation proceedings, and knew noth-

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[3] Administrative Code of City of New York, Title K41–18.0.

ing about them, nor of her right to make a claim against the city for damages to her property, until after she had consulted a lawyer in 1959. She alleged that by failing to give her adequate notice of the condemnation proceedings, the city had deprived her of property in violation of due process of law. The trial court granted the city's motion for judgment on the pleadings in an unreported opinion holding that "the notice provisions of Section K 41–8.0 of the Water Supply Act—admittedly fully complied with by the defendant"—were not "violative of the due process provisions of the Federal and State Constitutions . . . ." This judgment was affirmed by the Appellate Division,[4] and by the New York Court of Appeals, two judges dissenting.[5] The case is properly here on appeal under 28 U. S. C. § 1257 (2).

We hold that the newspaper publications and posted notices in the circumstances of this case did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer,* 311 U. S. 457; *Grannis* v. *Ordean,* 234 U. S. 385; *Priest* v. *Las Vegas,* 232 U. S. 604; *Roller* v. *Holly,* 176 U. S. 398." *Mullane* v. *Central*

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[4] 14 App. Div. 2d 183, 217 N. Y. S. 2d 975.

[5] 10 N. Y. 2d 522, 180 N. E. 2d 568. Although the complaint prayed for a judgment enjoining the city from diverting the waters of the Neversink, the New York courts construed the pleading as the appropriate way to raise the question of the adequacy of the notice provisions and to assert the right to be heard on the issue of damages. In her brief the appellant has conceded that she is not entitled to an injunction. Cf. *Walker* v. *Hutchinson City,* 352 U. S. 112, 114, n. 3.

Hanover Tr. Co., 339 U. S. 306, 314. In the *Mullane* case, which involved notice by publication to the beneficiaries of a common trust fund, the Court thoroughly canvassed the problem of sufficiency of notice under the Due Process Clause, pointing out the reasons behind the basic constitutional rule, as well as the practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation.

As was emphasized in *Mullane*, the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. "This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U. S., at 314. The Court recognized the practical impossibility of giving personal notice in some cases, such as those involving missing or unknown persons. But the inadequacies of "notice" by publication were described in words that bear repeating here:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." 339 U. S., at 315.

The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very

easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U. S., at 318.

This rule was applied in *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, 296, where the Court pointed out that "[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice," and that "[i]ts justification is difficult at best." The rule was applied again in *Walker* v. *Hutchinson City*, 352 U. S. 112, in a factual situation much akin to that in the present case. In *Walker* part of the appellant's land had been taken in condemnation proceedings, and he had been given "notice" of a proceeding to fix his compensation only by publication in the official city newspaper. The Court held that such notice was constitutionally insufficient, noting that the appellant's name "was known to the city and was on the official records," and that "[e]ven a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value." 352 U. S., at 116.

Decision in the case before us we think is clearly controlled by the rule stated in the *Mullane* case, and by the specifically relevant application of that rule in the *Walker* case. It is true that in addition to publishing in newspapers, the city in the present case did put some signs on trees and poles along the banks of the river. But no such sign was placed anywhere on the appellant's property, or ever seen by her. The posting of these signs, therefore, did not constitute the personal notice that the rule enunciated in the *Mullane* case requires.

The majority opinion in the New York Court of Appeals seems additionally to have drawn support from an assumption that the effect of the city's diversion of the

river must have been apparent to the appellant before the expiration of the three-year period within which the statute required that her claim be filed. 10 N. Y. 2d, at 526–527, 180 N. E. 2d, at 569–570. There was no such allegation in the pleadings, upon which the case was decided by the trial court. But even putting this consideration aside, knowledge of a change in the appearance of the river is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for compensation for damages resulting from the diversion.[6] That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant—an obligation which the mailing of a single letter would have discharged.

The judgment of the New York Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[6] The complaint alleged damages based upon the impairment of the river's value to the appellant for "bathing, swimming, fishing and boating." This claimed impairment allegedly resulted not from any change in the river's course, depth, or configuration, but from a decrease in the velocity of its flow.

Per Curiam.

HARRIS TRUCK LINES, INC., *v.* CHERRY MEAT PACKERS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 435. Decided December 17, 1962.

A Federal District Court rendered a judgment against petitioner, a defunct corporation, and denied a motion for a new trial while its general counsel, to whom had been delegated sole responsibility for all corporate decisions with respect to pending litigation, was in Mexico and could not be reached. Within the 30-day period for appeal permitted under Federal Rule of Civil Procedure 73 (a), petitioner's local counsel applied to the District Court for an extension of time within which to appeal. The District Court granted an extension of two weeks, and notice of appeal was filed within that time. The Court of Appeals dismissed the appeal, on the ground that no showing of "excusable neglect based on a failure of a party to learn of the entry of the judgment," within the meaning of Rule 73 (a), had been made to the District Court, that there was no basis for waiving the 30-day rule and that, therefore, the appeal was untimely filed. *Held:* Since petitioner had relied on the District Court's ruling extending the time within which to appeal and petitioner would suffer a hardship if it were set aside, the Court of Appeals should have let it stand. Pp. 215–217.

303 F. 2d 609, judgment vacated and case remanded.

Harlan L. Hackbert for petitioner.

John J. Kelly, Jr. for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is vacated. Petitioner, a presently defunct interstate motor carrier which had its principal place of business in California, sued respondent, a shipper, in the District Court for the Northern District of Illinois for underpayment of freight charges. Respondent counterclaimed for damages to its freight. Local trial counsel was engaged for the suit by petitioner's general counsel in

Los Angeles. The trial court ultimately dismissed petitioner's complaint and entered judgment for respondent for $11,347.52 on its counterclaim. Petitioner filed a motion for new trial, which was denied on June 28, 1961. On that date petitioner's general counsel, who by virtue of the fact that petitioner was winding up its business during 1961 had been delegated sole responsibility for all corporate decisions with respect to pending litigation, was vacationing in Mexico and could not be reached. He did not return to this country until July 20. In view of trial counsel's inability to contact the general counsel in order to ask whether to appeal, he instead came before the District Court in Illinois on July 13, stated his problem, and asked for an extension of time within which to appeal beyond the 30-day limit prescribed by Fed. Rules Civ. Proc., 73 (a), an extension which by the terms of the rule is limited to a period "not exceeding 30 days from the expiration of the original time herein prescribed." Opposing counsel, having been given notice, was present. The motion judge granted an extra two weeks, until August 11. Notice of appeal was filed on August 11. The Court of Appeals initially denied a motion of respondent to dismiss the appeal, and called for briefs on the merits. The court thereafter reconsidered and dismissed the appeal, holding that a showing of "excusable neglect based on a failure of a party to learn of the entry of the judgment," Fed. Rules Civ. Proc., 73 (a), had not been made out to the motion judge, that there was hence no basis for waiving the 30-day limit, and that the appeal was untimely filed and had to be dismissed for lack of appellate jurisdiction. 303 F. 2d 609.

The District Court properly entertained the motion here in question to extend petitioner's time to appeal to the Court of Appeals before the initial 30 days allowed for docketing the appeal had elapsed. Fed. Rules Civ. Proc., 73 (a), which governs here, is not limited to mo-

tions made after the 30 days have expired. See 7 Moore, Federal Practice (2d ed. 1955), ¶ 73.09[3]; *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.*, 193 F. 2d 951, 952 (C. A. 9th Cir. 1952); *Plant Economy, Inc.*, v. *Mirror Insulation Co.*, 308 F. 2d 275, 276–277 (C. A. 3d Cir. 1962). The standard applicable on such a motion, whether it is made before or after the 30 days have run, is that the movant must show "excusable neglect based on a failure of a party to learn of the entry of the judgment," Fed. Rules Civ. Proc., 73 (a). Compare 7 Moore, *supra*, ¶ 73.09[3]; Notes of Advisory Committee on 1946 Amendments to Rule 73 (a), quoted in 7 Moore, *supra*, ¶ 73.01[5], at p. 3111; *Knowles* v. *United States*, 260 F. 2d 852, 854 (C. A. 5th Cir. 1958). In view of the obvious great hardship to a party who relies upon the trial judge's finding of "excusable neglect" prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling. The judgment is vacated and the case is remanded to the Court of Appeals so that petitioner's appeal may be heard on its merits.

MR. JUSTICE HARLAN, dissenting.

I would have denied certiorari on the ground that this case does not qualify for review under Rule 19 of this Court.

Reaching the merits, however, I would affirm the judgment below substantially for the reasons given by the Court of Appeals. *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 303 F. 2d 609. Cf. *Link* v. *Wabash Railroad Co.*, 370 U. S. 626, 633–634; *United States* v. *Robinson*, 361 U. S. 220.

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC., ET AL. *v.* KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 503. Decided December 17, 1962.

The owners of three retail stores in Kentucky were fined for employing persons in their businesses on Sunday in violation of a Kentucky statute, and the convictions were sustained against their claim that the statute violated the First Amendment, applicable to the States by reason of the Fourteenth Amendment. *Held:* An appeal to this Court is dismissed for want of a substantial federal question.

Reported below: 357 S. W. 2d 708.

James E. Thornberry and *Edward M. Post* for appellants.

John B. Breckinridge, Attorney General of Kentucky, *Holland N. McTyeire,* Assistant Attorney General, and *Chas. E. Keller* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, dissenting.

This is a criminal prosecution of the owners of three retail stores for employing persons in their businesses on Sunday.[1] Each was fined $20 and costs and the convic-

[1] Kentucky Rev. Stat. § 436.160 reads in relevant part as follows:

"(1) Any person who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment

tions were sustained (357 S. W. 2d 708) against the claim that the laws violated the First Amendment, applicable to the States by reason of the Fourteenth Amendment. The case differs from *Braunfeld* v. *Brown,* 366 U. S. 599, and *Gallagher* v. *Crown Kosher Market,* 366 U. S. 617, in that those who actually observe the Sabbath on a day of the week other than Sunday are exempt from the penal provisions.[2] But as I indicated in my dissent in *McGowan* v. *Maryland,* 366 U. S. 420, 561, the unconstitutionality of Sunday laws strikes much deeper. By what authority can government compel one person not to work on Sunday because the majority of the populace deems Sunday to be a holy day? Moslems may someday control a state legislature. Could they make criminal the opening of a shop on Friday? Would not we Christians fervently believe, if that came to pass, that government had no authority to make us bow to the scruples of the Moslem majority?

I said in my dissent in the *McGowan* case:

> ". . . it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs. Some have religious scruples against eating pork. Those scruples, no matter how bizarre

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of every person employed in violation of this subsection shall be deemed a separate offense.

"(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.

"(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera."

[2] *Id.,* subsection (2).

> they might seem to some, are within the ambit of the First Amendment. . . . Is it possible that a majority of a state legislature having those religious scruples could make it criminal for the nonbeliever to sell pork? Some have religious scruples against slaughtering cattle. Could a state legislature, dominated by that group, make it criminal to run an abattoir? . . . A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause." 366 U. S., at 575.

The religious nature of this state regulation is emphasized by the fact that it exempts "members of a religious society" who actually observe the Sabbath on a day other than Sunday. The law is thus plainly an aid to all organized religions, bringing to heel anyone who violates the religious scruples of the majority by seeking his salvation not through organized religion but on his own.

I see no possible way by which this law can be sustained under the First Amendment.

> ". . . if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the State may not require anyone to practice a religion or even any

religion; and *fourth,* that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters . . . not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics." 366 U. S., at 563–564.

JOHN J. CASALE, INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 483. Decided December 17, 1962.

208 F. Supp. 55, affirmed.

Herbert Burstein for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum and *Robert W. Ginnane* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

CLARK *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 626, Misc. Decided December 17, 1962.

Appeal dismissed and certiorari denied.
Reported below: 242 La. 914, 140 So. 2d 1.

Luke A. Petrovich for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 479. Decided December 17, 1962.

205 F. Supp. 592, affirmed.

Bryce Rea, Jr. and *Frederick A. Babson, Jr.* for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane and *Fritz R. Kahn* for the United States and the Interstate Commerce Commission.

D. Robert Thomas, Harry C. Ames, Sr., Giles Morrow, S. Sidney Eisen and *James L. Givan* for appellee freight forwarders.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.

NATIONAL LABOR RELATIONS BOARD *v.* RELIANCE FUEL OIL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 88. Argued December 3, 1962.—Decided January 7, 1963.

Respondent, a local distributor of fuel oil, purchased a substantial amount of fuel oil and related products from a supplier who had imported them from outside the State and who was concededly engaged in interstate commerce. *Held:* Respondent's activities and related unfair labor practices "affected" commerce within the meaning of the National Labor Relations Act, and, therefore, were within the jurisdiction of the National Labor Relations Board. Pp. 224–227.

297 F. 2d 94, reversed.

Louis F. Claiborne argued the cause for petitioner. On the brief were *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Solomon I. Hirsh.*

Samuel H. Borenkind argued the cause for respondent. With him on the brief was *Frank J. Mercurio.*

PER CURIAM.

The Reliance Fuel Oil Corporation, respondent herein, was found by the National Labor Relations Board to have committed certain unfair labor practices in violation of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* Jurisdiction before the Board was predicated upon the fact that Reliance, a New York distributor of fuel oil whose operations were local,[1] purchased within the State a "substantial amount" of fuel

[1] In 1959 Reliance purchased a few hundred dollars worth of truck parts in New Jersey, but the Board did not rely on such transactions to sustain its assertion of jurisdiction.

oil and related products from the Gulf Oil Corporation, a supplier concededly engaged in interstate commerce. Most of the products sold to Reliance by Gulf were delivered to Gulf from without the State of New York and prior to sale and delivery to Reliance were stored, without segregation as to customer, in Gulf's tanks located within the State. During the fiscal year ending June 30, 1959, Reliance had gross sales in excess of $500,000 [2] and, during the calendar year 1959, it purchased in excess of $650,000 worth of fuel oil and related products from Gulf.

The Board adopted its trial examiner's findings that the operations of Reliance "affected" commerce within the meaning of the Act and that the unfair labor practices found tended "to lead to labor disputes burdening and obstructing commerce and the free flow of commerce . . . ." 129 N. L. R. B. 1166, 1171, 1182. The Court of Appeals reversed, 297 F. 2d 94, because, in its view, the record before the Board did not adequately demonstrate the existence of jurisdiction and remanded the case to the Board so that it might "take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." The only issue before this Court is whether on the record before it the Board properly found that it had jurisdiction to enter an order against Reliance; the substantive findings as to the existence of the unfair labor practices are not here in dispute.

Under § 10 (a) of the Act, the Board is empowered "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." Section 2 (6) defines "commerce" to mean "trade, traffic,

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[2] Since the Board apparently treated Reliance as a "retail" concern, this amount of gross sales met its self-imposed standard for exercise of jurisdiction. 129 N. L. R. B. 1166, 1170–1171.

commerce, transportation, or communication among the . . . States . . ." and § 2 (7) declares:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause. See, *e. g., Guss* v. *Utah Labor Board,* 353 U. S. 1, 3; *Polish Alliance* v. *Labor Board,* 322 U. S. 643, 647–648; *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607. Compare *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 480. The Act establishes a framework within which the Board is to determine "whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *Labor Board,* 322 U. S., at 648. See also *Labor Board* v. *Fainblatt,* 306 U. S., at 607–608.

That activities such as those of Reliance affect commerce and are within the constitutional reach of Congress is beyond doubt. See, *e. g., Wickard* v. *Filburn,* 317 U. S. 111. Through the National Labor Relations Act, ". . . Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities

which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish Alliance* v. *Labor Board,* 322 U. S., at 648. This being so, the jurisdictional test is met here: the Board properly found that by virtue of Reliance's purchases from Gulf, Reliance's operations and the related unfair labor practices "affected" commerce, within the meaning of the Act. The judgment of the Court of Appeals accordingly must be and is reversed.

MR. JUSTICE BLACK concurs in the result.

UNITED STATES *v.* BUFFALO SAVINGS BANK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 96. Argued December 3, 1962.—
Decided January 7, 1963.

A bank made a loan secured by a mortgage on real estate. Subsequently, the United States filed notice of a federal tax lien against the mortgagor's property. Thereafter liens for unpaid real estate taxes and other local assessments attached to the property. The bank instituted foreclosure proceedings, naming the United States as a party. *Held:* In distributing the proceeds of a foreclosure sale of the property, the federal tax lien should be given priority over the liens for unpaid real estate taxes and other local assessments, notwithstanding a state law providing that payments to discharge such state tax liens shall be deemed "expenses" of a mortgage foreclosure sale. Pp. 228–230.

11 N. Y. 2d 31, 181 N. E. 2d 413, reversed.

John B. Jones, Jr. argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Stephen J. Pollak, Joseph Kovner* and *George F. Lynch.*

John Horace Little argued the cause and filed briefs for respondent.

Laurens Williams and *William Poole* filed a brief for the American Bar Association, as *amicus curiae,* urging affirmance.

PER CURIAM.

In 1946, respondent Buffalo Savings Bank made a loan secured by a real estate mortgage. The United States filed notice of a federal tax lien against the mortgagor's property in 1953. Thereafter, in 1957 and 1958, liens for unpaid real estate taxes and other local assessments at-

tached to the property. The bank instituted foreclosure proceedings, naming the United States as a party. The trial court's decree ordered the property sold and the payment of local real estate taxes and other assessments as part of the expenses of the sale prior to the satisfaction of the tax lien of the United States. The United States appealed and the New York Supreme Court, Appellate Division, reversed, only to be reversed in turn by the New York Court of Appeals, which reinstated the trial court's judgment on the ground that the federal tax lien attached only to the mortgagor's interest in the surplus after the foreclosure sale and therefore was subordinate to the local taxes as "expenses of sale." 11 N. Y. 2d 31, 181 N. E. 2d 413.

We must reverse the judgment of the New York Court of Appeals for failure to take proper account of *United States* v. *New Britain,* 347 U. S. 81. That case rules this one, for there the Court quite clearly held that federal tax liens have priority over subsequently accruing liens for local real estate taxes, even though the burden of the local taxes in the event of a shortage would fall upon the mortgagee whose claim under state law is subordinate to local tax liens.

A similar argument based on the general character of the federal tax lien was made and specifically rejected in *New Britain.* Moreover, the state may not avoid the priority rules of the federal tax lien by the formalistic device of characterizing subsequently accruing local liens as expenses of sale. Cf. *United States* v. *Gilbert Associates, Inc.,* 345 U. S. 361. Finally, respondent's reliance on *United States* v. *Brosnan,* 363 U. S. 237, and *Crest Finance Co.* v. *United States,* 368 U. S. 347, is misplaced. *Brosnan* was concerned with foreclosure procedures, not with priorities, and in connection with the latter subject relied

upon *New Britain* among other cases. *Crest* is wholly inapposite here.

The judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

SOUTHERN CALIFORNIA EDISON CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 445. Decided January 7, 1963.

Appeal dismissed and certiorari denied.

Harry W. Sturges, Jr., Oscar A. Trippet and *Thomas H. Carver* for appellant.

William M. Bennett for appellee.

Herman F. Selvin and *Joseph R. Rensch* for Southern California Gas Co. et al.

PER CURIAM.

The motion of Southern California Gas Company and Southern Counties Gas Company of California to correct title and caption is granted.

The motions to dismiss are granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

THOMAS *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 635, Misc. Decided January 7, 1963.

Appeal dismissed and certiorari denied.
Reported below: 58 Cal. 2d 121, 373 P. 2d 97.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JAMIESON *v.* CHICAGO TITLE & TRUST CO. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 545. Decided January 7, 1963.

Appeal dismissed and certiorari denied.

Charles W. Jamieson, appellant, *pro se*.

Daniel S. Wentworth for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

VOLTAGGIO *v.* CAPUTO, COUNTY CLERK OF ESSEX COUNTY, NEW JERSEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 559. Decided January 7, 1963.

Appeal dismissed as moot.

Abraham I. Harkavy for appellant.

Howard W. Hayes for appellee Caputo.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

BLAUSTEIN *v.* AIELLO, SUBSTITUTE TRUSTEE.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 570. Decided January 7, 1963.

Appeal dismissed and certiorari denied.
Reported below: 229 Md. 131, 182 A. 2d 353.

Albert A. Rapoport and *Carl W. Berueffy* for appellant.

J. Douglas Bradshaw and *Howard J. Thomas* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

VICKERS *v.* TOWNSHIP COMMITTEE OF GLOUCESTER TOWNSHIP ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 572. Decided January 7, 1963.

Appeal dismissed and certiorari denied.
Reported below: 37 N. J. 232, 181 A. 2d 129.

Milford Salny for appellant.

M. Gene Haeberle for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

LAMB *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 578. Decided January 7, 1963.

Appeal dismissed and certiorari denied.

Reported below: 204 Cal. App. 2d 255, 22 Cal. Rptr. 284.

David Daar for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

WILLIAMSON ET AL. *v.* HOPEWELL REDEVELOPMENT & HOUSING AUTHORITY.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 582. Decided January 7, 1963.

Appeal dismissed for want of a substantial federal question.

Reported below: 203 Va. 653, 125 S. E. 2d 849.

Lewis S. Pendleton, Jr. for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

EASTER *v.* DEPARTMENT OF ASSESSMENTS OF BALTIMORE CITY.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 584. Decided January 7, 1963.

Appeal dismissed and certiorari denied.

Reported below: 228 Md. 547, 180 A. 2d 700.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JOHNSON *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 625, Misc. Decided January 7, 1963.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JONES *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 77. Argued December 3, 1962.—Decided January 14, 1963.

1. A state prisoner who has been placed on parole, under the "custody and control" of a parole board, is "in custody" within the meaning of 28 U. S. C. § 2241; and, on his petition for a writ of habeas corpus, a Federal District Court has jurisdiction to hear and determine his charge that his state sentence was imposed in violation of the Federal Constitution. Pp. 236–243.
2. The fact that such a petitioner has left the territorial jurisdiction of the District Court does not deprive that Court of jurisdiction when the members of the parole board are still within its jurisdiction and can be required to do all things necessary to bring the case to a final adjudication. Pp. 243–244.

294 F. 2d 608, reversed.

Daniel J. Meador argued the cause for petitioner. With him on the brief was *F. D. G. Ribble.*

Reno S. Harp III, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief was *Robert Y. Button,* Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

A United States District Court has jurisdiction under 28 U. S. C. § 2241 to grant a writ of habeas corpus "to a prisoner . . . in custody in violation of the Constitution . . . of the United States." The question in this case is whether a state prisoner who has been placed on parole is "in custody" within the meaning of this section so that a Federal District Court has jurisdiction to hear and determine his charge that his state sentence was imposed in violation of the United States Constitution.[1]

[1] Parole in this case was granted while petitioner's appeal was pending in the Court of Appeals.

In 1953 petitioner was convicted in a Virginia state court of an offense requiring confinement in the state penitentiary, and as this was his third such offense he was sentenced to serve 10 years in the state penitentiary. In 1961 he filed this petition for habeas corpus in the United States District Court for the Eastern District of Virginia, alleging that his third-offender sentence was based in part upon a 1946 larceny conviction which was invalid because his federal constitutional right to counsel had been denied at the 1946 trial. The District Court dismissed the petition but the Court of Appeals for the Fourth Circuit granted a certificate of probable cause and leave to appeal *in forma pauperis*. Shortly before the case came on for oral argument before the Court of Appeals petitioner was paroled by the Virginia Parole Board. The parole order placed petitioner in the "custody and control" of the Parole Board and directed him to live with his aunt and uncle in LaFayette, Georgia. It provided that his parole was subject to revocation or modification at any time by the Parole Board and that petitioner could be arrested and returned to prison for cause. Among other restrictions and conditions, petitioner was required to obtain the permission of his parole officer to leave the community, to change residence, or to own or operate a motor vehicle. He was further required to make monthly reports to his parole officer, to permit the officer to visit his home or place of employment at any time, and to follow the officer's instructions and advice. When petitioner was placed on parole, the Superintendent of the Virginia State Penitentiary, who was the only respondent in the case, asked the Court of Appeals to dismiss the case as moot since petitioner was no longer in his custody. Petitioner opposed the motion to dismiss but, in view of his parole to the custody of the Virginia Parole Board, moved to add its members as respondents. The Court of Appeals dismissed, holding that the case was moot as to the super-

intendent because he no longer had custody or control over petitioner "at large on parole." It refused to permit the petitioner to add the Parole Board members as respondents because they did not have "physical custody" of the person of petitioner and were therefore not proper parties. 294 F. 2d 608. We granted certiorari to decide whether a parolee is "in custody" within the meaning of 28 U. S. C. § 2241 and is therefore entitled to invoke the habeas corpus jurisdiction of the United States District Court. 369 U. S. 809.

The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available.[2] While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of "custody" nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.[3]

In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away

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[2] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9.

[3] See, *e. g.*, *McNally* v. *Hill*, 293 U. S. 131, 136 (1934); *Ex parte Parks*, 93 U. S. 18 (1876).

from her husband against her will.[4] The test used was simply whether she was "at her liberty to go where she please[d]." [5] So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes." [6] Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." [7] And more than a century ago an English court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind." [8] These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car. II, c. 2—the forerunner of all habeas corpus acts—as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States,[9] although in those cases each alien was free to go anywhere else in the world.

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[4] *Rex* v. *Clarkson*, 1 Str. 444, 93 Eng. Rep. 625 (K. B. 1722).

[5] *Id.*, at 445, 93 Eng. Rep., at 625.

[6] *Rex* v. *Delaval*, 3 Burr. 1434, 97 Eng. Rep. 913 (K. B. 1763).

[7] *Id.*, at 1437, 97 Eng. Rep., at 914.

[8] *Earl of Westmeath* v. *Countess of Westmeath*, as set out in a reporter's footnote in *Lyons* v. *Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821); accord *Ex parte M'Clellan*, 1 Dowl. 81 (K. B. 1831).

[9] *E. g.*, *Brownell* v. *Tom We Shung*, 352 U. S. 180, 183 (1956); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950); *United States* v. *Jung Ah Lung*, 124 U. S. 621, 626 (1888).

"[H]is movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." [10] Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service.[11] The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of their child,[12] one of which we had before us only a few weeks ago.[13] History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

Respondent strongly urges upon us that however numerous the situations in which habeas corpus will lie prior decisions of this Court conclusively determine that

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[10] *Shaughnessy* v. *United States ex rel. Mezei*, *supra* note 9, at 213.

[11] *E. g.*, *Ex parte Fabiani*, 105 F. Supp. 139 (D. C. E. D. Pa. 1952); *United States ex rel. Steinberg* v. *Graham*, 57 F. Supp. 938 (D. C. E. D. Ark. 1944).

[12] *E. g.*, *Boardman* v. *Boardman*, 135 Conn. 124, 138, 62 A. 2d 521, 528 (1948); *Barlow* v. *Barlow*, 141 Ga. 535, 536–537, 81 S. E. 433, 434 (1914); *In re Swall*, 36 Nev. 171, 174, 134 P. 96, 97 (1913) ("the question of physical restraint need be given little or no consideration where a lawful right is asserted to retain possession of the child"). See also *In re Hollopeter*, 52 Wash. 41, 100 P. 159 (1909) (husband held entitled to release of his wife from restraint by her parents); *In re Chace*, 26 R. I. 351, 358, 58 A. 978, 981 (1904) (wife held entitled to husband's society free of restraint by his guardian).

[13] *Ford* v. *Ford*, 371 U. S. 187 (1962).

the liberty of a person released on parole is not so restrained as to permit the parolee to attack his conviction in habeas corpus proceedings. In some of those cases, upon which the Court of Appeals in this case also relied, the petitioner had been completely and unconditionally released from custody; [14] such cases are obviously not controlling here where petitioner has not been unconditionally released. Other cases relied upon by respondent held merely that the dispute between the petitioner and the named respondent in each case had become moot because that particular respondent no longer held the petitioner in his custody.[15] So here, as in the cases last mentioned, when the petitioner was placed on parole, his cause against the Superintendent of the Virginia State Penitentiary became moot because the superintendent's custody had come to an end, as much as if he had resigned his position with the State. But it does not follow that this petitioner is wholly without remedy. His motion to add the members of the Virginia Parole Board as parties respondent squarely raises the question, not presented in our earlier cases, of whether the Parole Board now holds the petitioner in its "custody" within the meaning of 28 U. S. C. § 2241 so that he can by habeas corpus require the Parole Board to point to and defend the law by which it justifies any restraint on his liberty.

The Virginia statute provides that a paroled prisoner shall be released "into the custody of the Parole Board," [16] and the parole order itself places petitioner "under the

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[14] *Parker* v. *Ellis*, 362 U. S. 574 (1960); *Zimmerman* v. *Walker*, 319 U. S. 744 (1943); *Tornello* v. *Hudspeth*, 318 U. S. 792 (1943).

[15] *United States ex rel. Lynn* v. *Downer*, 322 U. S. 756 (1944); *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755 (1943); *Weber* v. *Squier*, 315 U. S. 810 (1942).

[16] Va. Code Ann. § 53–264.

custody and control of the Virginia Parole Board." And in fact, as well as in theory,[17] the custody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole,[18] and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime.[19] It is not rele-

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[17] See *Anderson* v. *Corall*, 263 U. S. 193, 196 (1923) ("While [parole] is an amelioration of punishment, it is in legal effect imprisonment"); von Hentig, Degrees of Parole Violation and Graded Remedial Measures, 33 J. Crim. L. & Criminology 363 (1943).

[18] Va. Code Ann. §§ 53–258, 53–259. In fact, all the Board has to find is that there was "a probable violation."

[19] Even the condition which requires petitioner not to violate any penal laws or ordinances, at first blush innocuous, is a significant restraint because it is the Parole Board members or the parole officer who will determine whether such a violation has occurred.

vant that conditions and restrictions such as these [20] may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute; if he can prove his allegations this custody is in violation of the Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot instead of permitting him to add the Parole Board members as respondents.

Respondent also argues that the District Court had no jurisdiction because the petitioner had left the territorial confines of the district. But this case is not like *Ahrens* v. *Clark,* 335 U. S. 188 (1948), upon which respondent relies, because in that case petitioners were not even detained in the district when they originally filed their petition. Rather, this case is controlled by our decision in *Ex parte Endo,* 323 U. S. 283, 304–307 (1944), which held that a District Court did not lose its jurisdiction when a habeas corpus petitioner was removed from the district so long as

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[20] The conditions involved in this case appear to be the common ones. See Giardini, The Parole Process, 12–16 (1959).

an appropriate respondent with custody remained. Here the members of the Parole Board are still within the jurisdiction of the District Court, and they can be required to do all things necessary to bring the case to a final adjudication.

The case is reversed and remanded to the Court of Appeals with directions to grant petitioner's motion to add the members of the Parole Board as respondents and proceed to a decision on the merits of petitioner's case.

Reversed.

Syllabus.

PAUL, DIRECTOR OF AGRICULTURE OF CALIFORNIA, ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 19. Argued October 17–18, 1962.—Decided January 14, 1963.

California attempted to enforce her minimum wholesale price regulations with respect to milk sold to the United States at three military installations in the State. Such milk was purchased for strictly military consumption, for resale at federal commissaries, for use at various military clubs or for resale in various post exchanges. The United States sued in a Federal District Court to enjoin enforcement of the regulations on the grounds that (a) the military installations were subject to the exclusive jurisdiction of the United States, and (b) such regulations unconstitutionally burdened the United States in the exercise of its constitutional power to establish and maintain the Armed Forces and to acquire and manage federal enclaves. A three-judge Court was convened, and it enjoined California officials from enforcing the regulations as to such milk. An appeal was taken directly to this Court. *Held:*

1. The issue as to whether or not the state regulatory scheme burdened the exercise by the United States of its constitutional powers to maintain the Armed Services and to regulate federal territory was a substantial federal question; the suit was one "required" to be heard by a three-judge court; and the case was properly brought to this Court by direct appeal under 28 U. S. C. § 1253. Pp. 249–250.

2. The California price-fixing regulations cannot constitutionally be applied to purchases of milk for strictly military consumption or for resale at federal commissaries, since the state regulations are in conflict with federal statutes and regulations governing the procurement with appropriated funds of goods for the Armed Services. Pp. 250–263.

(a) The federal statutes and regulations require competitive bidding or negotiations that reflect active competition; whereas the state milk regulations would defeat this purpose by having a state officer fix the price on the basis of factors not specified in the federal law. Pp. 250–255.

(b) A different conclusion is not required by 10 U. S. C. § 2306 (f), as amended Sept. 10, 1962, which requires contractors

to submit cost or pricing data for any negotiated contract but makes that requirement inapplicable where "prices are set by law or regulation." P. 256.

(c) Nor is a different conclusion required by § 2304 (g), also added in 1962, which refers to negotiated procurements in excess of $2,500 "in which rates or prices are not fixed by law or regulation." Pp. 256–261.

(d) The statutes and regulations governing procurements for the Armed Services apply to purchases of milk for resale at federal commissaries, as well as to purchases of milk for mess-hall use. Pp. 261–263.

3. Insofar as the judgment below pertains to purchases of milk with nonappropriated funds for use at various military clubs or for resale at post exchanges, it is vacated and the case is remanded to the District Court for further proceedings. Pp. 263–270.

(a) If the District Court finds that California's basic milk price-control law was in effect when the various tracts of land in question were acquired, judgment as to this class of purchases and sales should be for appellants. Pp. 264–269.

(b) If the District Court finds that California's basic milk price-control law was not in effect when such tracts were acquired, then it must make particularized findings as to where the purchases and sale of milk with nonappropriated funds are made and whether or not such tracts are areas over which the United States has "exclusive" jurisdiction, within the meaning of Art. I, § 8, cl. 17, of the Constitution. Pp. 269–270.

190 F. Supp. 645, affirmed in part and vacated and remanded in part.

John Fourt, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *Stanley Mosk,* Attorney General, *Lawrence E. Doxsee,* Deputy Attorney General, and *Roger Kent.*

Solicitor General Cox argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal.*

Briefs of *amici curiae,* urging reversal, were filed for the State of Mississippi by *Joe T. Patterson,* Attorney General; for the State of Nevada by *Charles E. Springer,*

Attorney General, and *Louis Mead Dixon,* Special Deputy Attorney General; for the State of Oregon by *Robert Y. Thornton,* Attorney General, and *Don Parker,* Assistant Attorney General; for Consolidated Milk Producers of San Francisco, Inc., by *Gerald D. Marcus;* for the Dairy Institute of California et al. by *Emil Steck, Jr., Thomas G. Baggot* and *Jesse E. Baskette;* for Petaluma Cooperative Creamery by *Joseph A. Rattigan;* and for the Protected Milk Producers Association of Paramount, California, et al. by *George E. Atkinson, Jr.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The main question in this case is whether California can enforce her minimum wholesale price regulations as respects milk sold to the United States at three military installations [1] (Travis Air Force Base, Castle Air Force Base, and Oakland Army Terminal) located within California and used for strictly military consumption, for resale at federal commissaries and for consumption or resale at various military clubs and post exchanges. Milk used for the first two categories of use is paid for with

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[1] The United States has abandoned a further claim that California cannot constitutionally enforce her price regulations against producers with respect to milk sold to distributors for processing and ultimately resold to the United States. The abandonment of this claim is not a confession of error but only a decision not to assert immunity from that price control as a matter of procurement policy.

It appears that while California has authorized her Director of Agriculture to establish minimum wholesale prices for both "fluid milk" and "fluid cream," and that while the Director has done so for a marketing area encompassing another base, all of the minimum wholesale price regulations appearing in the record pertain only to "fluid milk."

In view of these facts, the case now involves only California's power to enforce her minimum wholesale prices for "fluid milk" with respect to sales to the United States at the three bases involved.

appropriated funds, while that used in the clubs and exchanges is purchased with nonappropriated funds. Prior to January 1959, the milk supplies purchased with appropriated funds and used at those installations were obtained as a result of competitive bidding and on terms below the minimum prices prescribed by the Director of Agriculture of California. The Director advised distributors that the State's minimum price regulations were applicable to sales at Travis. Subsequently bids for milk-supply contracts at Travis were in strict compliance with California's regulations, the added cost to the Federal Government being about $15,000 a month. Later that year California instituted a civil action in the state courts against a cooperative that had supplied milk at Travis below the state minimum price, seeking civil penalties and an injunction. Thereafter the United States brought this suit in the District Court. The complaint alleged that state price regulation of milk sales at Travis, a federal enclave, was barred by the Constitution, since Travis is subject to the exclusive jurisdiction of the United States.[2] It also alleged that such regulation was an unconstitutional burden on the United States in the exercise of its constitutional power to establish and maintain the Armed Forces and to acquire and manage a federal enclave. The complaint asked that a three-judge court be convened.

Meanwhile, the Director of Agriculture of California warned distributors that the California regulation would be enforced at Castle and at Oakland. Bids for milk thereafter received at Castle were all at or above the state minimum price; and accordingly they were rejected. A

[2] Article I, § 8, cl. 17, of the Constitution gives Congress power "To exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

new invitation for bids was issued, and one of those received was below the state minimum. Thereupon California sued the successful bidder for an injunction; and later it sued other like bidders. A similar experience was had at Oakland; bids at or above the minimum were rejected, and a contract with a distributor for a prior period was extended for three months with an estimated saving to the United States of over $30,000. California again instituted suit to enjoin the supplier from selling at below established minimum wholesale prices. The United States amended its complaint to include its purchases at Castle. As respects Oakland the United States commenced a separate action by a complaint substantially identical with the other one; and they were later consolidated.

Appellants denied that these three installations were federal enclaves giving the United States exclusive jurisdiction and that there was any conflict between the state regulatory scheme and the federal procurement policy. Appellants also moved that the District Court stay these actions pending determination of state-law questions by the state courts in the pending actions.

The three-judge District Court refused to stay the proceedings and granted the motion of the United States for summary judgment. 190 F. Supp. 645. We postponed a determination of jurisdiction to the merits. 368 U. S. 965.

I.

Here, as in *United States* v. *Georgia Public Service Comm'n, post,* p. 285, decided this day, the suit was one "required" to be heard by a three-judge court within the meaning of 28 U. S. C. § 1253 and therefore properly brought here by direct appeal. Apart from the question whether the three federal areas were subject to the exclusive jurisdiction of the United States, the issue as to

whether or not the state regulatory scheme burdened the exercise by the United States of its constitutional powers to maintain the Armed Services and to regulate federal territory was a substantial federal question, as *Penn Dairies, Inc.*, v. *Milk Comm'n*, 318 U. S. 261, *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534, and *United States* v. *Georgia Public Service Comm'n, supra*, make clear. A three-judge court was therefore required even if other issues that might not pass muster on their own were also tendered. See 28 U. S. C. § 2281; *Florida Lime & Avocado Growers, Inc.*, v. *Jacobsen*, 362 U. S. 73.

II.

The California Act authorizes the Director of Agriculture to prescribe minimum wholesale and retail prices [3] "at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises." [4] The prohibitions run both against sales and against purchases; [5] and both criminal and civil penalties are provided.[6] The minimum wholesale prices, promulgated by the Director of Agriculture, have been enforced with respect to sales to the United States, as already noted.

In *Public Utilities Comm'n of California* v. *United States, supra*, we held that the federal procurement policy, which required competitive bidding as the general rule and negotiated purchase or contract as the exception, prevailed over California's regulated rate system. That case, like *United States* v. *Georgia Public Service Comm'n, supra*, concerned transportation of commodities. But the federal policy at the times relevant here was the same for procurement of supplies and services. The statutes in effect at the time of the *Public Utilities Comm'n of California* case are still the basic provisions governing all

[3] Calif. Agr. Code, § 4350.

[4] *Id.*, § 4352. [5] *Id.*, § 4361. [6] *Id.*, § 4410.

procurement by the Armed Services out of appropriated funds. They require that contracts be placed by competitive bidding, the award to be granted "to the responsible bidder whose bid . . . will be the most advantageous to the United States, price and other factors considered." [7] There are statutory exceptions, the relevant ones being as follows:

> "(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—
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> "(8) the purchase or contract is for property for authorized resale;
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> "(9) the purchase or contract is for perishable or nonperishable subsistence supplies;
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> "(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
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> "(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is

[7] 10 U. S. C. § 2305 (c). This statute is a recodification without substantial change of the Armed Services Procurement Act of 1947. See S. Rep. No. 2484, 84th Cong., 2d Sess. 19, 20–21.

lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier." [8]

The Armed Services Procurement Regulation speaks in unambiguous terms of a policy "to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered." [9] The Regulation states, "Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent . . . ." [10] Whatever method is used—formal advertising or negotiation—"competitive proposals" must be "solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as . . . to obtain for the Government the most advantageous contract—price, quality, and other factors considered." [11] If advertising for bids is used, the contract is to be awarded "to the lowest responsible bidder." [12] Moreover, even when advertising for bids is not used, competitive standards are not relaxed. The policy is "to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Government." [13] "The fact that a procurement is to be negotiated does not relax the requirements for competition." [14] "Whenever supplies . . . are to be procured by negotiation, price quotations . . . shall be solicited

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[8] *Id.*, § 2304 (a) (8) (9) (10) (15).

[9] Armed Services Procurement Regulation (revised to April 20, 1959), ¶ 1–301.

[10] *Ibid.*

[11] *Id.*, ¶ 1–302.2.

[12] *Id.*, ¶ 1–301.

[13] *Id.*, ¶ 3–801.1.

[14] *Id.*, ¶ 3–101 (a) (Army Procurement Procedure).

from all such qualified sources of supplies or services as are deemed necessary . . . to assure full and free competition . . . to the end that the procurement will be made to the best advantage of the Government, price and other factors considered." [15] The Regulation then specifies 20 separate considerations for the selection of a supplier in case of a negotiated procurement.[16] The first of these is a "comparison of prices quoted." [17]

We have said enough to show that the Regulation does more than authorize procurement officers to negotiate for lower rates. It directs that negotiations or, wherever possible, advertising for bids shall reflect active competition so that the United States may receive the most advantageous contract.

While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law. Moreover, when the supply contract is negotiated because "it is impracticable to obtain competition," to use the statutory words,[18] it is the state agency, not the federal procurement officer and the seller, that determines the price provisions of the contract, if state policy prevails. The collision between the federal policy of negotiated prices and the state policy of regulated prices is as clear and acute here as was the conflict between federal negotiated rates and state regulated rates in *Public Utilities Comm'n of California* v. *United States, supra.* In that case we said that the Regulation then existing, which was promulgated under the same Act here involved, "sanc-

[15] *Id.*, ¶ 3–101.

[16] *Ibid.*

[17] *Ibid.*

[18] 10 U. S. C. § 2304 (a)(10).

tion[ed] the policy of negotiating rates for shipment of federal property and entrust[ed] the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken." 355 U. S., at 542–543.

Penn Dairies, Inc., v. *Milk Control Comm'n, supra,* is not opposed. As we noted in *United States* v. *Georgia Public Service Comm'n, supra,* Congress, after the *Penn Dairies* decision and before *Public Utilities Comm'n of California* v. *United States,* revised and restated the federal procurement policy. As stated in the House Report,[19] ". . . the bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time it puts within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the Government of fair and reasonable prices for the supplies and services procured and affords an equal opportunity to all suppliers to compete for and share in the Government's business."

The Regulation controlling the *Penn Dairies* decision stated, as does the present Act, that supplies might be purchased on the open market where it is "impracticable to secure competition." 318 U. S., at 277. But, unlike the present Regulation, the earlier one declared that such a situation arose "when the price is fixed by federal, state, municipal or other competent legal authority." *Ibid.* The earlier Regulation further stated that federal procurement officers should not require suppliers to comply with state price-fixing laws before it was judicially determined whether the latter were applicable to government contracts (*id.,* at 276), a provision which

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[19] H. R. Rep. No. 109, 80th Cong., 1st Sess. 6.

the Court said manifested a federal "hands off" policy respecting minimum price laws of the States. *Id.*, at 278.

The present Regulation makes no such allowances, contains no such qualifications, and provides for no such exception. Its unqualified command is that purchases for the Armed Services be made on a competitive basis; and it has, of course, the force of law. *Public Utilities Comm'n of California* v. *United States, supra,* at 542–543. California's price-fixing policy for milk is as opposed to this federal procurement policy as was California's rate-making policy in *Public Utilities Comm'n of California* v. *United States, supra.*

Policy-wise, it might be better if state price-fixing systems were honored by federal procurement officials. It is urged that if that were done substandard producers of some suppliers would lose the advantage they may enjoy in competitive bidding. Congress could of course write that requirement into the law. Congress has written into the Act certain provisions of that character. It has required that contractors or manufacturers pay not less than the minimum wage as determined by the Secretary of Labor to be the prevailing wage; that building contractors pay such minimum wages to laborers and mechanics; and that no laborer or mechanic doing any work for contractors and subcontractors on government contracts shall be required or permitted to work more than eight hours a day, unless one and a half times the basic rate is paid for overtime.[20] The inclusion of these provisions, aimed as they are at substandard working conditions, shows that Congress has been alert to the problem. Their inclusion makes more eloquent the omission of any like requirement as respects prices or rates fixed by state law.

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[20] Section 2304 (f), which incorporates the Walsh-Healey Act (41 U. S. C. §§ 35–45), the Davis-Bacon Act (40 U. S. C. § 276a), and the Eight Hour Law (40 U. S. C. §§ 324, 325a).

It is argued that the Act of September 10, 1962, 76 Stat. 528, changed the situation. California points to § 2306 (f), which requires contractors to submit cost or pricing data for any negotiated contract, but goes on to lift that requirement where "prices [are] set by law or regulation." But this provision does not say, even equivocally, that federal procurement officers must abandon competitive bidding where prices are "set by law or regulation." The Regulation makes competitive bidding the rule, as we have seen. Section 2306 (f) only provides for waiver of "cost or pricing data" under certain kinds of negotiated contracts if the prices of some commodities included in the contract have been "set by law or regulation." That is to say, as, if, and when the procurement officer is authorized to accept prices "set by law or regulation," he need not follow the requirements of § 2306 (f) concerning "cost or pricing data."

California cites but builds no argument around § 2304 (g), also added in 1962. It is now suggested for the first time that § 2304 (g) requires federal procurement to follow state rate-fixing and state price-fixing. It provides in relevant part:

> "In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered. . . ."

Here again, the new statutory provision does not purport to say when rates or prices "fixed by law or regulation" govern federal procurement. At the time § 2304 (g) was added to the Act, the Regulation which we have dis-

cussed at length was in full force. That Regulation, unlike the one in *Penn Dairies*, eliminated the earlier provisions which had been construed to manifest a federal "hands off" policy respecting minimum price laws of the States. 318 U. S., at 278. The Regulation in force when this litigation started and in force when the 1962 Act was passed provides unequivocally for competitive bidding "to the maximum practicable extent," as we have noted. That might well permit procurement officers under some circumstances to purchase at state-fixed prices. But competitive bidding is the rule, not the exception. There is not a word in the legislative history of the 1962 Act [21]

[21] The ill which § 2304 (g) was designed to cure was a service-employed negotiating process which did not always produce low enough prices. Informal quotations, usually accompanied by a breakdown of cost elements, were first secured from as many sources as practicable. Separate negotiations with only a few low bidders were then undertaken in order to reduce the price by eliminating unnecessary or unjustified charges. Congress and the Comptroller General condemned this kind of "negotiation" because:

"It is our opinion that the authority to negotiate does not, of itself, warrant the curtailment of competition. Yet this may be the result where several proposals are received and the contracting officer decides to negotiate with only one offeror or to award a contract without discussion with any offeror. . . . We believe that . . . negotiations [should be conducted] with all responsible offerors who submit proposals within a competitive range, price and other factors considered." H. R. Rep. No. 1959, 86th Cong., 2d Sess. 17. See also S. Rep. No. 1900, 86th Cong., 2d Sess. 27; S. Rep. No. 1884, 87th Cong., 2d Sess. 8–9, 21–22; H. R. Rep. No. 1638, 87th Cong., 2d Sess. 4–5.

The exact meaning of the "rates or prices . . . fixed by law or regulation" exception to this "discussion" requirement is not too clear. The one short reference to § 2304 (g) in the congressional debates implies that a procurement officer could accept any price set "by law or regulation" without attempting to get a better price from the offeror:

"Section (e) of the bill [§ 2304 (g)] defines what actions shall constitute a negotiation. It requires that there be discussions be-

which indicates a congressional policy to uproot the Regulation or to change it. It was, indeed, repeatedly approved. See S. Rep. No. 1884, 87th Cong., 2d Sess.; H. R. Rep. No. 1638, 87th Cong., 2d Sess., Parts I and II; Cong.

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tween bidder and Government excepting in those limited instances where it would be futile to have discussions; for example, prices fixed by ratemaking authority or where there is an established market, as in foodstuffs." Cong. Rec., June 7, 1962, p. 9234.

But in view of the history of the "impracticable to obtain competition" exception in § 2304 (a) (10), with which this exception to the discussion requirement is linked (see S. Rep. No. 1900, 86th Cong., 2d Sess. 12), and the holding in *California Comm'n*, 355 U. S., at 542–543, it is impossible to read this exception either as requiring procurement by negotiation rather than by competitive bidding—or as absolutely prohibiting negotiation when prices are fixed by state law.

Section 2304 (a) (10) came to the 1947 Act from earlier Army procurement statutes. See H. R. Rep. No. 109, 80th Cong., 1st Sess. 8. It was "intended to place the maximum responsibility for decisions as to when it is impracticable to secure competition in the hands of the agency concerned." S. Rep. No. 571, 80th Cong., 1st Sess. 8. The House floor manager explained:

"This subsection will *permit* the services to negotiate contracts in situations where there is an absence of competitive conditions. The most typical situation involves an article which can be obtained from only one supplier. *But the authority will be available even where there are multiple sources if real competition is nonetheless lacking.*" (Emphasis added.) 93 Cong. Rec. 2319.

Negotiation was authorized in exceptional situations, such as § 2304 (a) (10), to "promote the best interests of the Government." *Ibid.* See *id.*, at 2316.

In order to allay fears by some that "negotiation" "means . . . the selection by more or less arbitrary methods of a supplier and the payment to him of a price which he has been able to set without fear of competition . . . ," the floor manager explained that:

"Experience has shown that by careful negotiation and by drafting a suitable contract it is frequently possible to secure substantial savings for the Government. In fact, negotiation properly employed often promotes and intensifies competition." *Id.*, at 2320.

It is now suggested that certain statements by witnesses at Committee Hearings show that by enacting § 2304 (a) (10) Congress indi-

Rec., June 7, 1962, p. 9231 *et seq.* Four years before the 1962 Act was passed *California Comm'n* had held that state regulations cannot preclude the Federal Government from negotiating lower rates. This result was not once questioned in the legislative history of the 1962 Act, even though the instant case was being litigated during this entire period. That Act only reflects an effort to provide collateral accommodations as, if, and when federal procurement follows state price-fixing. The mandate of 10 U. S. C. § 2305 (a) is still unequivocal; and the statutory exceptions to competitive bidding contained in § 2304 (a), discussed above, remain unchanged.

The 1962 Act fails to show a congressional purpose to abandon competitive bidding. On the contrary the pur-

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cated that it did not intend to allow the services to seek prices lower than those established by state regulatory agencies. Clearly those statements reinforce the congressional purpose to *allow* "negotiation" "where prices are set by law or regulation." S. Rep. No. 571, 80th Cong., 1st Sess. 8. See Hearings on H. R. 1366 before the Senate Committee on Armed Services, 80th Cong., 1st Sess. 15 (July 1, 1947); Hearings on H. R. 1366 and H. R. 3394 before the Senate Committee on Armed Services, 80th Cong., 1st Sess. 29; Hearings on H. R. 1366 before Subcommittee No. 6 of the House Committee on Armed Services, 80th Cong., 1st Sess., No. 51, at 521. But they in no way suggest that negotiations *must be had* unless they will "promote the best interests of the Government" (93 Cong. Rec. 2319), and they do not imply that the regulated price *must be accepted.*

From the Committee reports and congressional debates previously cited, it seems that a recent Senate report, issued after *California Comm'n* was decided, correctly interprets the purpose of § 2304 (a)(10):

"An examination of the 15 illustrative circumstances in which Exception 10 may be used readily reveals that some of these circumstances necessarily involve only one source of supply. Others offer the opportunity for competition." S. Rep. No. 1900, 86th Cong., 2d Sess. 12.

One of the illustrations was "Stevedoring, terminal services, when rates are prescribed by law." *Ibid.*

pose, as stated in S. Rep. No. 1884, 87th Cong., 2d Sess., was to increase the efficacy of the competitive bidding system then in force.

Not only was the existing Regulation cited repeatedly with approval, but the aim of the Act was described in unambiguous terms:

> "In general, the objectives of the changes are—
>
> "(1) To encourage more effort to accomplish procurements by formal advertising;
>
> "(2) To require a clearer justification before certain authorities to negotiate contracts are used;
>
> "(3) To obtain more competition in negotiated procurement;
>
> "(4) To provide safeguards for the Government against inflated cost estimates in negotiated contracts." *Id.*, p. 1.

The House received an equally unambiguous explanation from the floor manager of the bill:

> "[T]his bill . . . has for its chief purpose, an increase in competitive purchasing. . . . [O]nly 13 percent of purchasing is now done by sealed competitive bidding. That is clearly not enough. Competition must be increased; competition must be had even in negotiated purchasing; and all negotiated purchasing must be further reduced." Cong. Rec., June 7, 1962, p. 9234.

If there had been a desire to make federal procurement policy bow to state price-fixing in face of the contrary policy expressed in the Regulation, we can only believe that the objectives of the Act would have been differently stated. In sum, the references to rates or prices "fixed by law or regulation" are merely minor collateral accommodations to those situations where, within the limits of the Regulation and the 1962 Act, the federal procurement

official decides that the practical way to obtain the supplies or services is by following the state price-fixing or rate-fixing system.

California, however, says that whatever may be the federal policy as to purchases of milk for mess-hall use, purchases of milk for resale at federal commissaries stand on a different footing. These commissaries are "arms of the Government deemed by it essential for the performance of governmental functions" and "partake of whatever immunities" the Armed Services "may have under the Constitution and federal statutes." Cf. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 485. Purchases for resale at these federal commissaries are made from appropriated funds; and the procurement officers act under the same Regulation when they purchase milk for the commissaries as they do when they purchase it for mess-hall use. California points out, however, that the federal statute provides that where commodities are purchased for resale, they may be procured by negotiation rather than by formal advertising [22]—a provision we have quoted above and which was written into the law because purchases for commissaries "are generally not made by specifications but by brand names." [23] Milk, however, does not fit the category of commodities for which that exception was designed. Moreover, the statutory exception to formal advertising is merely permissive; the procurement officer "may" negotiate for articles to be resold but he is not required so to do. He is free to purchase by formal advertising from the responsible bidder whose bid "will be the most advantageous to the United States." [24] Whether he negotiates milk contracts or uses competitive bidding is made dependent by the federal statute on his informed

[22] 10 U. S. C. § 2304 (a) (8).

[23] S. Rep. No. 571, 80th Cong., 1st Sess. 7.

[24] 10 U. S. C. § 2305 (c).

discretion, not on state price-fixing policies. Moreover, as, if, and when he negotiates, the Regulation, as already noted, requires price quotations "from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure full and free competition . . . to the end that the procurement will be made to the best advantage of the Government, price and other factors considered." [25] And, to repeat, the procurement officer when he negotiates is controlled by 20 separate factors, one of which is "comparison of prices quoted," [26] and none of which relates in any manner whatsoever to the price-fixing policies of a State.

The fact that the cost of products sold at commissaries benefits commissary purchasers does not make the commissary any the less a federal agency. Cf. *Standard Oil Co.* v. *Johnson, supra.* Congress authorizes the payment for commissary supplies from appropriated funds.[27] The federal statutes dealing with procurement policies expressly make them applicable to all purchases "for which payment is to be made from appropriated funds." [28] Congress, to be sure, has provided that commissaries may not use any appropriated funds "unless the Secretary of Defense has certified that items normally procured from commissary stores are not otherwise available at a reasonable distance and a reasonable price in satisfactory quality and quantity to the military and civilian employees of the Department of Defense." [29] Here again, however, the question of what is a "reasonable price" is left to the discretion of a federal officer. Congress has not

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[25] Armed Services Procurement Regulation (revised to April 20, 1959), ¶ 3-101.

[26] *Ibid.*

[27] See, *e. g.*, 75 Stat. 377.

[28] 10 U. S. C. § 2303.

[29] 75 Stat. 377-378.

directed that commissaries be removed from the purview of federal procurement policies; nor has it adopted state price-fixing policies as federal policies when it comes to purchases for commissaries or otherwise.

III.

What we have said would dispose of the entire case but for the fact that some of the milk was purchased out of nonappropriated funds for use in military clubs and for resale at post exchanges. This brings us to the question whether Congress has power to exercise "exclusive legislation" over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia and "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

The power of Congress over federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of "exclusive" legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action. The question was squarely presented in *Pacific Coast Dairy* v. *Department of Agriculture,* 318 U. S. 285, which involved, as does the present litigation, California's Act and an attempt to fix the prices at which milk could be sold at Moffett Field. We held that "sales consummated within the enclave cannot be regulated" by California because of the constitutional grant of "exclusive legislation" respecting lands purchased by the United

States with the consent of the State (*id.*, at 294), even though there was no conflicting federal Regulation.

Thus the first question here is whether the three enclaves in question were "purchased by the Consent of the Legislature" of California within the meaning of Art. I, § 8, cl. 17.

The power of the Federal Government to acquire land within a State by purchase or by condemnation without the consent of the State is well established. *Kohl* v. *United States*, 91 U. S. 367, 371. But without the State's "consent" the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being simply that of an ordinary proprietor. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141–142. In that event, however, it was held in *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 541, 542, that a State could complete the "exclusive" jurisdiction of the Federal Government over such an enclave by "a cession of legislative authority and political jurisdiction."

Thus if the United States acquires with the "consent" of the state legislature land within the borders of that State by purchase or condemnation for any of the purposes mentioned in Art. I, § 8, cl. 17, or if the land is acquired without such consent and later the State gives its "consent," the jurisdiction of the Federal Government becomes "exclusive." Since 1940 Congress has required the United States to assent to the transfer of jurisdiction over the property, however it may be acquired.[30] In either event—whether the land is ac-

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[30] 40 U. S. C. § 255 provides in part:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or

quired by purchase or condemnation on the one hand or by cession on the other—a State may condition its "consent" upon its retention of jurisdiction over the lands consistent with the federal use. *James* v. *Dravo Contracting Co., supra,* 146–149. Moreover, as stated in *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 99–100:

> "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights."

California has had several statutory provisions relevant to our problem under Art. I, § 8, cl. 17. One pertained to acquisition of land by the United States through "purchase or condemnation." [31] Another con-

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secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

[31] Cal. Stat. 1939, c. 710, § 34, provides:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime,

cerned land "ceded or granted" by California to the United States.[32]

Those provisions were codified in 1943, acquisitions by "purchase or condemnation" appearing in one section [33] and acquisitions by cession in another.[34] Another section of the codification, after stating that California "cedes" to the United States "exclusive jurisdiction" over all lands "held, occupied, or reserved" by the United States "for military purposes or defense," provides that a description of the land by metes and bounds and a map or plat of the land "shall first be filed in the proper office of record in the county in which the lands are situated." [35]

Most of the transactions creating these three federal enclaves took place between 1942 and 1944, some in 1946 [36] and some even later.

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may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted."

[32] *Ibid.*:

"The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States."

[33] Calif. Gov. Code, § 111.

[34] *Id.*, § 113.

[35] *Id.*, § 114.

[36] In the case of Oakland, the United States having first accepted jurisdiction in 1943, accepted again in 1949 after enactment in 1946

Whether the United States has acquired exclusive jurisdiction over a federal enclave is a federal question. As stated in *Silas Mason Co.* v. *Tax Commission,* 302 U. S. 186, 197:

> "The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise. . . . In this instance, the Supreme Court of Washington has held that the State has not yielded exclusive legislative authority to the Federal Government. . . . That question, however, involving the extent of the jurisdiction of the United States, is necessarily a federal question."

As already noted, a California statute "cedes to the United States exclusive jurisdiction" over described lands provided a description of the metes and bounds and a map of the land first be filed.[37] California earnestly argues

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(Calif. Gov. Code, § 126) of a new and expanded statutory provision whereby California gave its consent "to the acquisition" by the United States of land in that State. This provision required that findings be made by the State Lands Commission, after hearings, that the statutory conditions had been met. The Commission made the findings describing by metes and bounds three parcels of land at Oakland as respects which California consented to the "exclusive" jurisdiction of the United States.

[37] Note 35, *supra.*

that "cedes" in that context includes "purchases" and "acquisitions by condemnation." But the California statutes have consistently drawn the line between acquisitions by cession on the one hand and all other acquisitions on the other. That is the gist of a recent opinion of the Attorney General of California, in which he treats an acquisition by cession as an alternative to acquisition in other ways and rules that when the acquisition is by means other than cession no map of the land need first be filed.[38] That seems to us to be the fair meaning of the statutory provisions.

The conditions expressed in the California Acts,[39] by which California consented to "the purchase or condemnation" of land by the United States for the prescribed purposes, do not undertake to make applicable to the federal enclaves all future laws of California. Since a State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws. See *Stewart & Co.* v. *Sadrakula, supra; Arlington Hotel* v. *Fant,* 278 U. S. 439. If the price-control laws California is now seeking to apply to sales on federal enclaves were not in effect when the United States acquired these lands,[40] the case is on all fours with *Pacific Coast Dairy* v. *Department of Agriculture, supra.* There the Court held that the California statutes under which some of the present acquisitions were made granted the United States exclusive jurisdiction over the tracts in question in spite of the express conditions therein contained (*id.,* at 293) and that this price-control law was

[38] 23 Op. Atty. Gen. Calif. 14.

[39] Note 31, *supra.*

[40] We do not reach the question that would be presented where a state law in effect at that time was later repealed and subsequently reenacted.

not enforceable on a federal enclave in California because it was adopted "long after the transfer of sovereignty." 318 U. S., at 294. The United States seeks shelter under that rule, saying California is trying to enforce its current regulatory scheme, not the price regulations in effect when the purchases were made. Yet if there were price control of milk at the time of the acquisition and the same basic scheme has been in effect since that time, we fail to see why the current one, albeit in the form of different regulations, would not reach those purchases and sales of milk on the federal enclave made from nonappropriated funds. Congress could provide otherwise and has done so as respects purchases and sales of milk from appropriated funds. But since there is no conflicting federal policy concerning purchases and sales from nonappropriated funds, we conclude that the current price controls over milk are applicable to these sales, provided the basic state law authorizing such control has been in effect since the times of these various acquisitions. A remand will be necessary to resolve that question, as the present record does not show the precise evolution of the present regulatory scheme.

There also remains another uncertainty concerning the purchases and sales of milk out of nonappropriated funds. There is a dispute over where some of these sales are made. Each of the three enclaves has numerous units acquired at various times, some of which may be subject to "exclusive" federal jurisdiction and some of which may not be. California earnestly claims that some sales out of nonappropriated funds were made on units of land over which the United States does not have "exclusive" jurisdiction. She makes the claim as respects some milk used at Travis, some at Castle, and some at Oakland.

We do not resolve the question but vacate the judgment of the District Court insofar as it relates to purchases and sales of milk made from nonappropriated funds and

remand the case to the District Court to determine whether at the respective times when the various tracts in question were acquired California's basic price-control law as respects milk was in effect. If so, judgment on this class of purchases and sales should be for appellants. If not, then the District Court must make particularized findings as to where the purchases and sales of milk from nonappropriated funds are made and whether or not those tracts are areas over which the United States has "exclusive" jurisdiction within the meaning of Art. I, § 8, cl. 17 of the Constitution.

Moreover, the decree must be modified to reflect the change in federal procurement policy as respects producers, already noted.[41]

Accordingly the judgment is affirmed in part and in part vacated and remanded.

It is so ordered.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN and MR. JUSTICE GOLDBERG join, dissenting in part.

I.

I do not doubt that Congress in the exercise of its war power [1] could by virtue of the Supremacy Clause [2] provide that an otherwise valid state law affecting the price of milk shall not apply to milk purchased with federal funds for use at these military installations. But I cannot agree that Congress has done so. I am unable to find either in the terms of the relevant legislation or in its history any evidence of a congressional purpose to immunize these federal purchases from the generally applicable California minimum price regulations. The

[41] See note 1, *supra*.

[1] U. S. Const., Art. I, § 8, cl. 12.

[2] U. S. Const., Art. VI, cl. 2.

California statutes regulating its milk industry are admittedly a valid exercise of that State's power to legislate for the general health and welfare of its people, and serve the important function of insuring stability in the production and supply of a vital commodity. In *Penn Dairies* v. *Milk Control Comm'n,* 318 U. S. 261, the Court emphasized that "[a]n unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous." 318 U. S., at 275. I think that the congressional purpose in the present case is less than ambiguous—that Congress has in fact manifested a presumption and a desire that valid state welfare legislation such as this is not to be undermined by the procurement activities of the Federal Government.[3]

In the *Penn Dairies* case the Court held that the State of Pennsylvania could enforce its milk marketing statute against suppliers dealing with the federal military establishment. It was held that the federal procurement legislation then in effect contained no evidence of a policy to override state regulatory legislation of this type. 318 U. S., at 272–275. A different result was reached in *California Comm'n* v. *United States,* 355 U. S. 534, where the Court held that California could not apply its law regulating intrastate transportation rates to the carriage of strategic military supplies of the United States. The Court discussed at length the peculiarly burdensome

[3] It is to be emphasized that the issue in this case is not whether federal procurement officers must themselves undertake to enforce regulatory state laws. The scope of the state regulatory system and its validity are questions properly reserved for state agencies and courts, acting upon members of the regulated industry, subject to review by this Court of any federal issues presented. The only issue in this case is whether a State may itself enforce its regulatory legislation against those who deal with the Federal Government.

effect that the state regulation there involved would have upon the shipment of this kind of freight, stressing the difficulty and delays involved in classifying such goods under existing state tariffs, and the importance to the national security of secrecy and rapid movement. 355 U. S., at 544–546. Regardless of any impact on transportation costs, therefore, enforcement of the State's regulatory scheme was barred because it constituted a direct interference with the performance of a vital federal function. *M'Culloch* v. *Maryland,* 4 Wheat. 316. The opinion in the *California Commission* case also discussed the 1947 Armed Services Procurement Act,[4] but nowhere suggested that the 1947 Act had changed the law upon which the decision in *Penn Dairies* had rested. Rather, the Court distinguished the *Penn Dairies* case on the ground that the Pennsylvania milk marketing statute had not subjected the National Government or its officers to any direct restraints, as did the California legislation. 355 U. S. 543–544.

The Court today abandons that distinction and for the first time suggests that the 1947 Act did in fact change the federal procurement policy in effect at the time of the *Penn Dairies* decision. I think this novel interpretation of the statute which is the basis of all federal procurement, civilian as well as military,[5] is incorrect and that

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[4] 62 Stat. 21, as amended, 10 U. S. C. §§ 2301–2314.

[5] It should be noted that the Court's decision today is likely to affect federal as well as state price regulation. For example, a large part of the milk marketing regulation in the United States is presently accomplished under federal marketing orders pursuant to § 8c of the Agricultural Adjustment Act, as amended, 7 U. S. C. § 608c. See 7 CFR § 1001 *et seq.* Federal marketing orders typically maintain minimum producer prices, and this regulation, in turn, has the effect of maintaining a certain level of handler prices. See, *e. g., Lehigh Valley Coop.* v. *United States,* 370 U. S. 76, 78–83. It is perhaps for this reason that the Government has abandoned its attack upon Cali-

any doubt which could ever have existed on that score has been laid to rest by the amendment to the 1947 statute enacted at the last session of Congress.[6]

There is simply no support in any of the pertinent legislative materials for the conclusion that Congress, solely in order to save a few dollars, intended to permit federal agencies to subvert general and nondiscriminatory state

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fornia's producer price regulation in the present case. The Government's change of position, however, is only a matter of discretion, and it can hardly be contended that a scheme of producer price maintenance would be any less in conflict with the Court's view of federal procurement policy.

I fail to see how the Court can limit its finding of conflict to state regulatory systems. Any thought that federal milk regulation may somehow be distinguishable necessarily supposes that Congress would have desired immunity from the burdens of state regulatory laws while at the same time acquiescing to the very same economic burdens when they arise under a federal marketing order—an assumption not only incongruous but also inconsistent with express congressional policy to treat both state and federal marketing legislation as complementary parts of a single scheme.

"[I]n order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, [the Secretary is directed] to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities . . . ." 7 U. S. C. § 610 (i).

The problem is not academic. It has already arisen in one unreported case in which a handler selling to a military installation asserted immunity from an otherwise applicable federal marketing order on the ground that the order was in conflict with military procurement policy. The district judge rejected the contention on the ground that any increase in cost would be justified by the Government's interest in maintaining a stable supply of milk. *Knudsen Bros. Dairy, Inc.*, v. *Benson*, Civil No. 8145 (D. C. D. Conn., August 18, 1960).

[6] Since the present case calls for an *in futuro* injunction against enforcement of state regulatory statutes, all federal laws currently in force are relevant to our decision.

regulatory measures which promote health, safety, or better working or economic conditions. Indeed, Congress has evidenced a directly contrary intention. Of course, as the decision in the *California Commission* case demonstrates, state law cannot be allowed to impair fulfillment of appropriate federal functions, be they civil or military; similarly, state measures contrary to national policy cannot be allowed to bind or inhibit federal activities. This case, however, presents no such problems. The only issue is whether Congress has or has not expressed a desire to bypass valid state regulatory legislation in the conduct of federal procurement activities.

The 1947 Armed Services Procurement Act was proposed to Congress jointly by the War and Navy Departments. During World War II, these Departments had run their procurement operations with a relatively free hand under the First War Powers Act, 55 Stat. 838, which authorized placement of contracts without regard to existing provisions of law regulating procurement procedures. The War Production Board had early determined that the traditional method of procurement by advertising for sealed competitive bids was unsatisfactory during wartime, and had adopted the practice of placing contracts by direct negotiation with suppliers.[7] When the war ended, the need arose to return to a peacetime system of procurement, and the 1947 bill was introduced to fill this need. At the same time, the military departments thought that the prewar procurement statutes were "woefully inadequate for supplying the tremendously expanding needs for military supplies and equipment," [8] and that

[7] W. P. B. Directive No. 2, March 3, 1942. See Hearings on H. R. 1366 before Subcommittee No. 6 of the House Committee on Armed Services, 80th Cong., 1st Sess., No. 51, at 469 (February 4, 1947). (Hereinafter cited as February House Hearings.)

[8] February House Hearings, at 469 (statement of W. J. Kenney, Assistant Secretary of the Navy).

"a total reversion to prewar methods would be unfortunate in the extreme and would severely handicap the War and Navy Departments . . . ." [9]

Reflecting this attitude, the Departments stressed three major objectives of the new legislation they proposed:

> "1. To modernize peacetime military procurement methods;
>
> "2. To unify the procurement legislation under which the War and Navy Departments do their buying; and
>
> "3. To permit suspension of advertising as a method of procurement upon the declaration of a national emergency." [10]

The third purpose, to provide authority to suspend competitive bidding in a national emergency, was simply intended to eliminate the need for legislation in time of crisis and thus to enable the defense establishment to respond immediately to such emergencies.[11] As for the second, prior to the war each branch of the armed services had been governed by its own separate, and sometimes unique, procurement legislation. The 1947 Act was intended to substitute a single statute for all military procurement.[12]

The proposal to "modernize" the law was primarily a proposal to relax, in certain situations, the very strict rule requiring that almost all contracts be placed through advertised competitive bidding. Experience had shown

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[9] Hearings on H. R. 1366 and H. R. 3394 before the Senate Committee on Armed Services, 80th Cong., 1st Sess. 8 (June 24, 1947) (statement of Secretary Kenney). (Hereinafter cited as June Senate Hearings.)

[10] *Id.*, at 7.

[11] See, *e. g.*, February House Hearings, at 469.

[12] *Ibid.*

that the formalized ritual of competitive bidding was often unwieldy and uneconomical. For example, competitive bidding was not suited to contracts involving secret projects, nor for contracts involving items for which there was no effective competition between sellers. For these types of procurement, the bill proposed direct negotiation between the Government and available suppliers. The heart of the proposed bill was § 2 (c), now 10 U. S. C. § 2304 (a), which set out a list of 15 specific exceptions to the rule of competitive bidding.[13]

The bill was reported out and passed in essentially the same form as proposed. Both the House and Senate Reports made clear that the purposes of the bill remained the same. The House Report began by saying, "This bill provides uniform purchase authority for the Army and Navy, and reestablishes the requirement that the advertising-competitive bid method shall be followed by those Departments in placing the great majority of their contracts for supplies and services." [14] The Report went on to acknowledge that there are "a limited number of situations [in which] the public interest requires that purchases be made without advertising," and it listed most of the specific exceptions proposed by the War and Navy Departments.[15] It was at this point, after describing the purpose to unify procurement laws and to relax the previously rigid advertising requirements, that the House Report summed up by describing the bill as "a comprehensive revision and restatement of the laws gov-

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[13] *Ibid.* See also Hearings on H. R. 1366 and H. R. 1382 before Subcommittee No. 6 of the House Committee on Armed Services, 80th Cong., 1st Sess., No. 4, at 27 (January 13, 1947) (statement of Robert P. Patterson, Secretary of War). (Hereinafter cited as January House Hearings.)

[14] H. R. Rep. No. 109, 80th Cong., 1st Sess. 3.

[15] *Ibid.*

erning the procurement of supplies and services by the War and Navy Departments." *Id.*, at 6.[16]

The background of the 1947 Act thus makes it abundantly clear that the "revision and restatement" of law involved in its formulation had absolutely nothing to do with the issue dealt with in *Penn Dairies* and presented by the case now before us. The dissatisfaction with existing prewar procurement law centered upon its lack of uniformity and its apparent insistence upon the ritual of competitive bidding in situations for which such procedures were unsuited. Neither of these major concerns touched upon the problem presented by the present case—whether federal procurement transactions were to undermine valid state laws regulating price.[17]

Evidence is not lacking, however, of the attitude of Congress with respect to that problem, and I think such evidence clearly shows that Congress presumed and intended that federal procurement was to be conducted subject to valid state price and rate regulation of otherwise general applicability.

First, it is clear from the Act itself that Congress was not willing to override other important social and economic policies in blind pursuit of the lowest possible purchasing price. The Act commands procurement officers to consider many other factors in addition to price. For instance, § 8 directs compliance with the Walsh-Healey Act, the Davis-Bacon Act and the Eight Hour Law.[18]

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[16] *Id.*, at 6. The Senate Report said substantially the same thing. S. Rep. No. 571, 80th Cong., 1st Sess. 1–2. See also 93 Cong. Rec. 2319.

[17] Nothing to the contrary can be derived from statements describing the bill as a return to a general rule of competitive bidding. Any legislation reactivating peacetime procurement methods would inevitably be a return to competitive bidding after a wartime regime of procurement by negotiation.

[18] 62 Stat. 24, as amended, 10 U. S. C. § 2304 (f). See S. Rep. No. 571, 80th Cong., 1st Sess. 20.

And in § 2 (b) Congress declared that a fair proportion of purchases and contracts made under the chapter should be placed with small business.[19]

Secondly, while the legislative history of the 1947 Act contains only a few references to the specific problem of price-regulated industries, these references clearly reflect an acknowledgment that state price regulations are to apply to suppliers doing business with the Government. The statements in question relate to § 2 (c)(10) of the bill as enacted, now 10 U. S. C. § 2304 (a)(10). The subsection provides that the head of an agency need not employ the advertised bid method when

> "(10) the purchase or contract is for property or services for which it is impracticable to obtain competition."

This exception to the normal bidding procedure was first enacted in the Army Appropriations Act of 1901, 31 Stat. 905. Until 1947 it applied only to Army procurement, and one of the purposes of the Act was to make the exception applicable to all services.[20] In explaining the existing law on this subject, Under Secretary Royall of the War Department, chief spokesman for that Department, made the following remarks:

> "As to the exception which deals with supplies or services for which it is impracticable to secure competition, this language originally appeared in the act of March 2, 1901 (31 Stat. 1905; 10 U. S. C. 1201), and has been the subject of a number of highly restrictive administrative interpretations. In my opin-

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[19] 62 Stat. 21, as amended, 10 U. S. C. § 2301.

[20] February House Hearings, at 521 (statement of Colonel P. W. Smith); June Senate Hearings, at 29 (statement of Secretary Kenney).

ion, this exception is intended to apply in at least these three situations:

"1. Where the nature of the supply or service is such that only one person can furnish it, for example, a patented or secret article.

"2. *Where the price of the supply or service has been legally fixed.*

"3. Where the practical circumstances are such that it would be difficult to secure real competitive proposals by means of advertising for formal bids." (Emphasis added.)[21]

The Senate Report expressly acknowledged the applicability to federal procurement activities of laws regulating prices:

"The experiences of the war and contracts negotiated since the war in the fields of stevedoring, ship repairs, chartering of vessels, *where prices are set by law or regulation,* or where there is a single source of supply, have shown clearly that the competitive-bid-advertising method is not only frequently impracticable but does not always operate to the best interests of the Government." (Emphasis added.) [22]

The plain meaning of these references to price regulation is that both Congress and the Departments concerned assumed such price regulation would apply to government purchases. Unless this assumption is made, there would be no reason for believing that competition would be "impracticable" in these areas. For, absent the duty of suppliers to comply with uniform price regulations, it

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[21] Hearing on H. R. 1366 before the Senate Committee on Armed Services, 80th Cong., 1st Sess. 15 (July 1, 1947). (Hereinafter cited as July Senate Hearings.) Secretary Royall repeated the explanation in a colloquy with Senators Byrd and Kilgore. *Id.*, at 23.

[22] S. Rep. No. 571, 80th Cong., 1st Sess. 8.

would not be "impracticable" to advertise for bids at competitive prices.

Apart from the clear import of these references, it is also significant to note that both the Departments and the sponsoring congressional committees were aware of the fact that governmental price fixing would affect the nature of competition for procurement contracts. Yet not once did any spokesmen for the Departments question or even mention the rule of the *Penn Dairies* decision, of which they could hardly have been unaware.[23] Indeed, they consistently testified that § 2 (c)(10) was, as to regulated prices, merely a restatement of the existing law.[24]

Despite this clear legislative history, it is said that the statutory authorization to "negotiate" in cases where com-

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[23] The Departments' request for authority to attack bid prices which "were not independently reached in open competition," 10 U. S. C. § 2304 (a)(15), dealt with the altogether different problem of collusive pricing of the type generally violative of the antitrust laws. The Senate Report on the 1947 Act explains:

"This paragraph will be most useful to break collusive bidding, follow-the-leader pricing, rotated low bids, identical bids requiring drawing of lots, uniform estimating systems, refusal to classify the Government as other than a retail buyer regardless of the quantity purchased, and similar practices. In such situations the Government should have the power to inquire into the reasons why it is not securing the benefits of competition. It should be able to call for facts and figures and to negotiate to eliminate unwarranted charges, excessive reserves for contingencies, commissions or brokerage charges, and unwarranted profits.

. . . . . .

"On this same subject another new subsection has been added. It will require reference of bids suspected of not being arrived at by open competition to the Attorney General for appropriate action under the antitrust laws." S. Rep. No. 571, 80th Cong., 1st Sess. 4–5. See also January House Hearings, at 26; June Senate Hearings, at 9.

[24] See testimony cited in notes 20 and 21, *supra*.

petitive bidding is not appropriate reflects a policy to allow procurement officers to bargain for prices lower than those set by state regulatory agencies.[25] If all we had to go on were this provision of the 1947 Act, there might be an arguable basis for an inference of such a federal procurement policy, since the 1947 statute nowhere defined the word "negotiation." [26] Just last year, however, Congress added an amendment to the Act, in which it defined "negotiation" for the first time. Although the definition generally adopts and implements the ordinary meaning of the word—to bargain for a lower price—it expressly excepts price-regulated transactions. The amendment provides in pertinent part:

> "(g) In all negotiated procurements in excess of $2,500 in which *rates or prices are not fixed by law or regulation* and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered. . . ." [27] (Emphasis added.)

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[25] The relevant provision of the 1947 Act provided: "All purchases and contracts for supplies and services shall be made by advertising . . . except that such purchases and contracts may be negotiated by the agency head without advertising if—

. . . . . .

"(10) for supplies or services for which it is impracticable to secure competition . . . ." § 2 (c), 62 Stat. 21.

[26] The only approximation of a definition by the Departments proposing the bill was the statement that: "Negotiation includes any manner of effecting procurement other than advertising." February House Hearings, at 427.

[27] Public Law 87–653, 76 Stat. 528. The Senate Report explains that the amendment fills the void created by the fact that "[e]xisting

In the words of the floor manager of the bill in the House, price-regulated transactions were excepted because they were "instances where it would be futile to have discussions." [28] In short, it is clear that Congress has now explicitly declared what was adumbrated in the legislative history of the 1947 Act—that federal procurement is to be conducted subject to valid state price and rate regulations of otherwise general applicability.[29]

While the Court's opinion discusses this legislative history, I read the opinion as resting primarily on the Court's reading of certain executive regulations issued under the authority of the procurement law. In this I think the Court errs—for two reasons. First, if I am

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procurement law does not define the word 'negotiation' except to indicate that it means 'make without formal advertising.'" S. Rep. No. 1884, 87th Cong., 2d Sess. 2. See also H. R. Rep. No. 1638, 87th Cong., 2d Sess. 4–5.

[28] Cong. Rec., June 7, 1962, p. 9234. In explaining the amendment to the House subcommittee, committee counsel similarly described the exception for price regulated transactions as one where "negotiation would be futile or meaningless." Hearings on H. R. 5532 before Subcommittee No. 3 of the House Committee on Armed Services, 87th Cong., 2d Sess., No. 51, at 5071 (April 10, 1962).

[29] Further illumination of this policy is furnished by subsection (e) of the 1962 Act, 76 Stat. 528, amending 10 U. S. C. § 2306. After providing that in certain circumstances contractors must certify the correctness of their cost or pricing data, subsection (e) then makes an exception for situations in which there will be little question as to ultimate price:

"*Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, *prices set by law or regulation* or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination." (Emphasis added.)

right in the view that the statute recognizes that federal procurement is not to be immunized from the impact of valid state economic legislation, then any regulations to the contrary are completely invalid. *Williamson* v. *United States*, 207 U. S. 425, 462; *Lynch* v. *Tilden Co.*, 265 U. S. 315, 321–322; *United States* v. *Barnard*, 255 F. 2d 583, 588–589. Secondly, I think that the regulations upon which the Court relies do not speak with so clear a voice as the Court would have us believe. The Court can find not a single regulation of either general or specific application which says, in so many words, that a procurement officer may in his discretion negotiate a contract in disregard of valid state price regulation.

II.

I agree with the conclusion in Part III of the Court's opinion that it is not now possible to undertake final resolution of the Government's claim that the sales of milk involved in this case take place on federal enclaves within the scope of Art. I, § 8, cl. 17, and therefore are immune from state regulation under the rule of *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U. S. 285. Even if these military installations are now such federal enclaves, this claim will be moot if the substance of California's milk regulation scheme antedated the acquisition of exclusive jurisdiction by the Federal Government. The concept of exclusive jurisdiction "has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty . . . ." *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 99. This question of priority cannot be decided on the record before us, and its resolution, therefore, first requires a remand of the case to the District Court. If I am right in my view of the federal procurement law, a finding that state regulation was imposed before these

military installations became federal enclaves within the scope of the constitutional provision would mean that all sales of milk at issue in this case, regardless of the source of funds, would be subject to the legislation which California has validly enacted to stabilize and make economically sound the business of producing and marketing a commodity vital to the health and welfare of her people.

Syllabus.

UNITED STATES *v.* GEORGIA PUBLIC SERVICE COMMISSION.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 81. Argued October 18, 1962.—Decided January 14, 1963.

The United States sued in a Federal District Court to enjoin the Georgia Public Service Commission from prohibiting common carriers from contracting with agencies of the Federal Government for the mass transportation within that State of the household goods of civilian employees of the Federal Government, at rates other than those prescribed by the Georgia Commission. A three-judge District Court convened to hear the case denied an injunction, and the United States appealed directly to this Court. *Held:*

1. This case is one "required" to be heard by a three-judge District Court, and a direct appeal to this Court was properly taken under 28 U. S. C. § 1253. Pp. 287–288.

2. Federal procurement statutes provide for the negotiation of special rates for transporting household goods of federal employees at government expense; and the State could not defeat the purpose of this legislation by prohibiting the common carriers from transporting such goods intrastate at rates other than those prescribed by the Georgia Public Service Commission. *Public Utilities Commission of California* v. *United States*, 355 U. S. 534. Pp. 288–293.

197 F. Supp. 793, reversed.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Loevinger* and *Lionel Kestenbaum.*

Paul Rodgers, Assistant Attorney General of Georgia, argued the cause for appellee. With him on the brief was *Eugene Cook,* Attorney General.

Austin L. Roberts, Jr. filed a brief for the National Association of Railroad & Utilities Commissioners, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Civilian employees of the Federal Government were reassigned from Savannah to Atlanta, Georgia, and the General Services Administration sought to arrange by competitive bidding for the intrastate mass shipment of their household goods between those cities. Georgia law, however, does not permit a rate for transporting household goods of more than one family; it requires carriers to quote schedules of approved rates, the total charge to be the sum of the charges figured for individual families.[1] Five carriers submitted bids quoting rates lower than those allowed by the Georgia tariff. After the competitive bidding was over and the contract awarded to the lowest responsible bidder, the Georgia Public Service Commission threatened these five carriers with revocation of their intrastate operating certificates should they perform at the rates quoted GSA. The successful bidder thereupon notified GSA that it was unable to perform the contract. Appellee instituted proceedings against the carrier, looking toward the revocation of its certificate. The United States sought to intervene in that proceeding but it was not allowed to do so. Appellee also refused to allow a GSA official to testify as to the circumstances of the shipping contract that the Commission claimed conflicted with Georgia law.

Thereupon the United States filed suit in the District Court and requested the convocation of a three-judge court. The complaint alleged, *inter alia,* that Georgia law burdened federal officers in carrying out their federal functions and conflicted with federal procurement

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[1] See Ga. Household Goods Tariff No. 1–B, GPSC–MF No. 3, Rules 8 and 15. The latter provides in part that "Property of two or more families or establishments will not be accepted for transportation as a single shipment."

policy. The issue as finally joined raises squarely those questions. The District Court held that there was no conflict between Georgia's regulatory scheme and the federal one, concluding that the case is governed by *Penn Dairies, Inc.*, v. *Milk Control Comm'n*, 318 U. S. 261. See 197 F. Supp. 793. The case is here on direct appeal (28 U. S. C. §§ 1253, 2101 (b)); we postponed consideration of the question of jurisdiction until a hearing on the merits. 369 U. S. 882.

We have jurisdiction of this appeal if the case was "required . . . to be heard and determined by a district court of three judges." 28 U. S. C. § 1253. The question whether the Georgia regulatory scheme is unconstitutional because it burdened the exercise by the United States of its power to maintain a civilian service and to carry out other constitutional functions is a substantial one, as our decisions in *Penn Dairies, Inc.*, v. *Milk Control Comm'n, supra; Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534, and *Paul* v. *United States, ante*, p. 245, decided this day, show, and therefore required a three-judge court to adjudicate it. 28 U. S. C. § 2281; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713; *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73. We have presented here more than an isolated issue whether a state law conflicts with a federal statute and therefore must give way by reason of the Supremacy Clause. Cf. *Kesler* v. *Department of Public Safety*, 369 U. S. 153. Direct conflict between a state law and federal constitutional provisions raises of course a question under the Supremacy Clause but one of a broader scope than where the alleged conflict is only between a state statute and a federal statute that might be resolved by the construction given either the state or the federal law. *Id.*, 157. So we have a clear case for convening a three-judge court. Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the

calling of a three-judge court. See *Sterling* v. *Constantin*, 287 U. S. 378, 393–394; *Railroad Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 391.

The District Court, acting on motions for summary judgment filed by each of the parties, said that were the property being transported "strictly governmental property," the case would be governed by *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534. But since the property involved here is household goods, not military supplies, the court concluded that the case is controlled by *Penn Dairies, Inc.*, v. *Milk Control Comm'n, supra.*

The distinction drawn by the District Court between this case and *Public Utilities Comm'n of California* v. *United States, supra,* is not tenable. Between 1943, when *Penn Dairies* was decided, and 1958, when *Public Utilities Comm'n of California* was decided, Congress enacted the Armed Services Procurement Act of 1947, 62 Stat. 21, later codified without substantial change, 70A Stat. 127, 10 U. S. C. § 2301 *et seq.*, which extended and elaborated the federal procurement policy of negotiated rates which, as we noted in the *Public Utilities Comm'n of California* case, conflicted with California's policy of regulated rates. 355 U. S., at 544. The federal Regulation involved in that case was superseded in 1958 by the Military Traffic Management Regulation.[2] That Regulation includes the "procedures to govern the movement of uncrated household goods." [3] Another Regulation provides that their transportation is authorized "by the mode of transportation . . . which results in the lowest over-all cost to the Government and which provides the required service satisfactorily." [4] This entails "negotiation" with

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[2] Promulgated March 1958, as amended to October 10, 1960.

[3] *Id.*, c. 101, ¶ 101001.

[4] Joint Travel Regulations, c. 8, April 1, 1959, as amended to October 1, 1961, ¶ 8001.

carriers for "rates" [5] on military traffic and "Special arrangements pertaining to other freight traffic." [6] Examples could be multiplied but enough has been said to show that the new Military Traffic Management Regulation continues in effect the provisions of the earlier regulation in force when the *Public Utilities Comm'n of California* case was decided.

The same policy of negotiating rates for shipment of federal property now governs nondefense agencies. The basic statute is the Federal Property and Administrative Services Act of 1949, 63 Stat. 383, 40 U. S. C. § 481, 63 Stat. 393, as amended, 41 U. S. C. § 251 *et seq.* Its procurement provisions are substantially similar to those contained in the Armed Services Procurement Act of 1947. It was, indeed, enacted to extend to GSA "the principles of the Armed Services Procurement Act of 1947, with appropriate modifications principally designed to eliminate provisions applicable primarily to the military." H. R. Rep. No. 670, 81st Cong., 1st Sess., p. 6. Under the regulations promulgated pursuant to this Act, procurement of transportation and improvement of transportation and traffic practices of executive agencies are entrusted to the Commissioner of the Transportation and Public Utilities Service (TPUS).[7] He is to represent the executive agencies "in negotiations of rates and contracts for transportation." [8] The Commissioner in procurement and contracting [9]

> "(a) Negotiates purchases and contracts for property and services without advertising, and makes any

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[5] Military Traffic Management Regulation, amended to November 5, 1959, c. 201, ¶ 201001 (b).

[6] *Id.*, ¶ 201001 (k).

[7] General Services Adm. Order, ADM 5450.3, change 4, ¶ 141a; TPS 7460.1, Attachment, ¶ 3, March 15, 1960.

[8] ADM, *supra*, ¶ 141b; TPS 7460.1, ¶ 4.

[9] *Id.*, ¶ 142a.

determinations and decisions required in connection therewith . . . .

"(b) Makes purchases and contracts for property and services by advertising, and determines that the rejection of all bids is in the public interest.

"(c) Determines the type of negotiated contract which will promote the best interests of the Government . . . ."

The Regulation governing the Commissioner's functions enjoins him:

"to evaluate mass movements of household goods and personal effects and, when feasible, to negotiate with carriers to effect the most economical basis for the movement of such household goods and personal effects." [10]

"Except when the exigency of the movement precludes such action, all requests for rates for mass movements . . . shall be made by formal advertising [for bids] . . . ." [11]

That Regulation is plainly within the purview of the Act, which provides in § 302, as amended, 41 U. S. C. § 252, as follows:

"All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

. . . . . .

"(2) the public exigency will not admit of the delay incident to advertising;

. . . . . .

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[10] TPS 7460.1, ¶ 3.

[11] *Id.*, Attachment, ¶ 7b (1).

"(10) for property or services for which it is impracticable to secure competition;

. . . . . .

"(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable . . . or have not been independently arrived at in open competition: *Provided,* That . . . (B) the negotiated price is the lowest negotiated price offered by any responsible supplier . . . ."

Section 253 (b) provides that awards shall be made "to that responsible bidder whose bid . . . will be most advantageous to the Government, price and other factors considered." Moreover, 40 U. S. C. § 481 (a)(4) directs GSA to represent executive agencies "in negotiations with carriers" with respect to transportation "for the use of executive agencies." Transfer of household goods of federal employees, whether military [12] or civilian, has been made by Congress a charge against federal funds when employees are transferred from one official station to another.[13]

It is said that the 1949 Act gives the Administrator power to deal only with whoever has authority to make rate decisions, whether it be the carrier on interstate shipments or the state regulatory agency on intrastate shipments. 40 U. S. C. § 481 does indeed provide:

"The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

. . . . . .

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[12] 63 Stat. 813, as amended, 37 U. S. C. § 253 (c).

[13] 60 Stat. 806, as amended, 5 U. S. C. § 73b–1.

"(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies *in negotiations with carriers* and *other public utilities* and in *proceedings involving carriers or other public utilities before Federal* and *State regulatory bodies* . . . ." (Emphasis added.)

But that provision does not say that state-fixed rates govern the federal procurement official unless he can get them changed. It is comparable to § 22 of the Interstate Commerce Act, 49 U. S. C. § 22, which allows the United States to obtain preferred rates. "The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers . . . is not necessarily prohibited." *Nashville R. Co.* v. *Tennessee,* 262 U. S. 318, 323. And see *Southern R. Co.* v. *United States,* 322 U. S. 72; *United States* v. *Interstate Commerce Comm'n,* 352 U. S. 158, 174.

By § 481 (a) the Administrator is authorized to seek before state agencies preferential treatment for federal shipments. But there is not a word suggesting that, failing in that regard, he is bound to accept the state-fixed rate. The Act and the Regulation speak too clearly in terms of the "lowest over-all cost" to the Government, either through competitive bidding or negotiation with carriers, for us to conclude that the only relief against state fixed rates is an administrative remedy before the state agency either through negotiation or litigation. Congress has not tied the hands of the federal procurement officials so tightly.

We have then a federal procurement policy of negotiated rates for transporting household goods of federal employees—a policy as clear and as explicit as the federal policy for transporting military supplies involved in *Public Utilities Comm'n of California* v. *United States,*

supra. The Georgia policy, which is opposed to this federal policy, must accordingly give way. For as we noted in *Public Utilities Comm'n of California* v. *United States, supra,* at 544, a State is without power by reason of the Supremacy Clause to provide the conditions on which the Federal Government will effectuate its policies. Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. See *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127 *et seq.* Once they have spoken it is our function to enforce their will.

Reversed.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN and MR. JUSTICE GOLDBERG join, dissenting.

The governing law in this case is Title III of the Federal Property and Administrative Services Act of 1949,[1] but that Act simply "extends to the General Services Agency the principles of the Armed Services Procurement Act of 1947." [2] In *Paul* v. *United States, ante,* p. 270, I have stated why I think those principles clearly contemplate that government procurement is to be conducted within the framework of valid state regulatory legislation. For the reasons there stated, I also dissent from the Court's judgment in this case.

Only one additional consideration needs mention here. The Court purports to find some additional support for the result in this case in one provision of the 1949 Act which has no counterpart in the 1947 Act. Section 201 (a) of the 1949 Act [3] provides, in pertinent part,

"(a) The Administrator shall . . .

. . . . . .

[1] 63 Stat. 393, as amended, 41 U. S. C. §§ 251–260.

[2] H. R. Rep. No. 670, 81st Cong., 1st Sess. 6.

[3] 63 Stat. 383, as amended, 40 U. S. C. § 481 (a).

> "(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies *in negotiations with carriers and other public utilities* and *in proceedings involving carriers or other public utilities before Federal and State regulatory bodies . . .*" (Emphasis added.)

The Court seizes upon the words "in negotiations with carriers" as evidence that Congress authorized the Administrator to by-pass state rate schedules when placing contracts for intrastate transportation.

Far from supporting the Court's position, I think § 201 (a) is simply another example of Congress' basic assumption that state price regulation will remain applicable to federal procurement transactions. The section refers both to negotiations with individual carriers and to proceedings before regulatory agencies. It seems to me that the authorization of these alternative procedures must be read against the background of § 22 of the Interstate Commerce Act, 49 U. S. C. § 22, which provides that I. C. C. rate schedules governing interstate shipments are not to apply to transportation for the Federal Government. In light of this express statutory exemption for interstate shipments, it appears quite clear that § 201 (a) says nothing more than that the Administrator has power to deal with whoever has authority to make rate decisions—with the carrier for interstate shipments, and with state regulatory agencies for intrastate shipments when regulated by state law.[4]

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[4] The same conclusion must be drawn from the several regulations cited by the Court. When read in full, both the military and civilian transportation regulations seem to anticipate that procurement officers will deal sometimes directly with individual carriers, and some-

Footnote 4—Continued.

times with a regulatory body. The Executive Director, Military Traffic Management Agency, is made responsible for:
"Negotiation with all for-hire carriers of cargo or their rate-making agencies for classifications, rates, charges, rules and regulations on military traffic . . . ." Chapter 201, Military Traffic Management Regulation, March 1958, as amended to November 5, 1959.
Similarly, regulations governing nonmilitary transportation make the Transportation and Public Utilities Service responsible for:
"the provision of advice and expert testimony on behalf of executive agencies in proceedings before Federal and State regulatory bodies involving transportation, public utilities [and] communications . . . ." General Services Adm. Order, ADM 5450.3, Change 4, July 31, 1959, § 1, ¶ 141 (b).

PAN AMERICAN WORLD AIRWAYS, INC., *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 23. Argued November 8, 1962.—Decided January 14, 1963.*

Charging violations of §§ 1, 2, and 3 of the Sherman Act, the United States brought this civil suit against Pan American World Airways, W. R. Grace & Co. and their jointly owned subsidiary, Pan American-Grace Airways (Panagra). The complaint alleged that, when Pan American and Grace organized Panagra in 1928, they agreed that Pan American and Panagra would not parallel each other's air routes, that this was a combination and conspiracy in restraint of trade and monopolization and attempted monopolization of air transportation between the United States and South America and also that Pan American had used its control over Panagra to prevent it from obtaining authority from the Civil Aeronautics Board to extend its route from the Canal Zone to the United States. The District Court found that Pan American had violated § 2 of the Sherman Act by suppressing Panagra's efforts to extend its route from the Canal Zone to this country, and it ordered Pan American to divest itself of its stock in Panagra; but it dismissed the complaint against Grace and Panagra, holding that none of their practices violated the Sherman Act. *Held:* The narrow questions presented by this complaint had been entrusted by Congress to the Civil Aeronautics Board, and the entire complaint should have been dismissed. Pp. 298–313.

(a) Since enactment of the Civil Aeronautics Act in 1938, the airline industry has been regulated under a regime designed to change the prior competitive system, and the Federal Aviation Act of 1958 made no changes relevant to the problem presented by this case. Pp. 300–301.

(b) Under § 411 of the Federal Aviation Act of 1958, the Civil Aeronautics Board has jurisdiction over "unfair practices" and "unfair methods of competition," even though they originated prior to 1938. Pp. 302–303.

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*Together with No. 47, *United States* v. *Pan American World Airways, Inc., et al.*, also on appeal from the same Court.

(c) In regulating air carriers, the Board is to deal with at least some antitrust problems. In addition to its power under § 411, it is given authority by §§ 408, 409, and 412 over consolidations, mergers, purchases, leases, operating contracts, acquisition of control of an air carrier, interlocking relations, pooling arrangements, etc.; and the Clayton Act is enforced by the Board, insofar as it is applicable to air carriers. P. 304.

(d) The legislative history indicates that the Civil Aeronautics Board was intended to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned. P. 304.

(e) This Court does not hold, however, that there are no antitrust violations left to the Department of Justice to enforce. Pp. 304–305.

(f) The Acts charged in this suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers. Pp. 305–306.

(g) Whatever the unfair practice or unfair method employed, § 411 of the Act was designed to bolster and strengthen antitrust enforcement. Section 411 is patterned after § 5 of the Federal Trade Commission Act, and cases interpreting § 5 are relevant in determining the meaning of § 411; but the application of § 411 in any given situation must be determined in light of the standards set by the Civil Aeronautics Act. Pp. 306–308.

(h) The Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers. Pp. 308–310.

(i) The Board's power to issue a "cease and desist" order is broad enough to include the power to compel divestiture where the problem lies within the purview of the Board. Pp. 311–313.

193 F. Supp. 18, reversed and cause remanded.

David W. Peck argued the cause and filed briefs for Pan American World Airways, Inc., appellant in No. 23 and appellee in No. 47.

Solicitor General Cox argued the cause for the United States. With him on the briefs were *Assistant Attor-*

ney General Loevinger, Bruce J. Terris and *Robert B. Hummel.*

Lawrence J. McKay argued the cause for W. R. Grace & Co., appellee in No. 47. With him on the briefs were *William E. Hegarty* and *Raymond L. Falls, Jr.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil suit brought by the United States charging violations by Pan American, W. R. Grace & Co., and Panagra of §§ 1, 2, and 3 of the Sherman Act, 15 U. S. C. §§ 1, 2, and 3. This suit, which the Civil Aeronautics Board requested the Attorney General to institute, charged two major restraints of trade. First, it is charged that Pan American and Grace, each of whom owns 50% of the stock of Panagra, formed the latter under an agreement that Panagra would have the exclusive right to traffic along the west coast of South America free from Pan American competition and that Pan American was to be free from competition of Panagra in other areas in South America and between the Canal Zone and the United States. Second, it is charged that Pan American and Grace conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires. Pan American was also charged with using its 50% control over Panagra to prevent it from securing authority from the C. A. B. to extend its route from the Canal Zone to the United States.[1]

[1] Another charge relates to alleged restraints on Panagra by its two stockholders which the District Court summarized as follows:

"To a large extent the evidence of restraints on Panagra in the categories of joint offices, communications, equipment, publicity and sales are matters of agreement that must be initially approved by the C. A. B. and to a large degree have been approved and others are awaiting approval or extension of approval previously granted." 193 F. Supp. 18, 22.

In 1928, when Pan American and Grace entered into an agreement to form Panagra,[2] air transportation was in its infancy; and this was the first entry of an American air carrier on South America's west coast. Pan American in 1930 acquired the assets of an airline competing with it for air traffic from this country to the north and east coasts of South America and received a Post Office air mail subsidy contract.[3]

The District Court found that there was no violation by Pan American and Grace of § 1 of the Sherman Act through the division of South American territory between Pan American and Panagra.[4] It held, however, that Pan

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[2] Panagra was organized January 25, 1929, and received on March 2, 1929, an air mail contract from the Postmaster General (see 45 Stat. 248, 1449) even though it was not the lowest bidder. See 36 Op. Atty. Gen. 33.

[3] The District Court said:

"The award of a Post Office contract for each sector of South America, in effect, assured the American contractor of a monopoly in that sector insofar as American flag operations were concerned, and the invaluable assistance of the State Department and Post Office Department in the carrier's relations with the countries along its route." 193 F. Supp. 18, 31.

[4] The District Court said:

"The State Department actively assisted defendants in defeating the foreign company designs for monopoly concessions and in securing American operating rights along their routes. The contracts awarded by the Post Office Department defined the international route of the contractor, and so to a large extent defined the area of development and expansion of any such contractor. The Post Office policy during the years 1928 to 1938 was to award but one contract for each route, in effect to subsidize one American carrier in a particular sector. The ideal route pattern as envisaged by the C. A. B. today is to have two carriers, Pan American and a merged 'Panagra-Braniff,' and the only difference from that existing prior to Braniff's entry would be the extension of 'Panagra-Braniff' to the United States. Competition among American carriers under the policy of the Post Office Department under the foreign mail contracts, was economically impossible, and most likely detrimental to the sound

American violated § 2 of the Sherman Act by suppressing Panagra's efforts to extend its route from the Canal Zone to this country—in particular, by blocking Panagra's application to the Civil Aeronautics Board for a certificate for operation north of the Canal Zone.[5] It indicated that Pan American should divest itself of Panagra stock. But it directed dismissal of the complaint against Grace and against Panagra, holding that none of their respective practices violated the Sherman Act. 193 F. Supp. 18. Both Pan American and the United States come here on direct appeals (15 U. S. C. § 29); and we postponed the question of jurisdiction to the merits. 368 U. S. 964, 966.

When the transactions, now challenged as restraints of trade and monopoly, were first consummated, air carriers were not subject to pervasive regulation. In 1938 the Civil Aeronautics Act (52 Stat. 973) was passed which

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development of American flag service, which would have complicated or embarrassed the effective rendition of diplomatic assistance from the State Department, and actually cause a waste of public monies. Competition between Panagra and Pan American certainly was not encouraged by this government. On the contrary, there appears to emerge from the evidence presented a definite policy of the government approving a sort of 'zoning' for the operations of the American international carriers in the nature of east and west coast spheres as was ultimately arranged between Pan American and Panagra. Agreement not to parallel each other's service in South America seems perfectly consistent with the air transportation policy of this country in those formative years." 193 F. Supp. 18, 34.

[5] See *Panagra Terminal Investigation*, 4 C. A. B. 670, remanded, *W. R. Grace & Co.* v. *C. A. B.*, 154 F. 2d 271. We granted certiorari, 328 U. S. 832, and later dismissed the case as moot, 332 U. S. 827, because Pan American and Panagra had settled their dispute through an agreement approved by the C. A. B. (see note 15, *infra*), after the C. A. B. had said that joint control of Panagra by Pan American and Grace was "unhealthy" (4 C. A. B. 670, 678) and that "the joint owners cooperatively should enable Panagra to apply for access to the east coast of the United States." *Additional Service to Latin America*, 6 C. A. B. 857, 914.

was superseded in 1958 by the Federal Aviation Act, 72 Stat. 731, 49 U. S. C. § 1301 *et seq.*, the latter making no changes relevant to our present problem. Since 1938, the industry has been regulated under a regime designed to change the prior competitive system. As stated in S. Rep. No. 1661, 75th Cong., 3d Sess., p. 2, "Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense."

Some provisions of the 1938 Act deal only with the future, not the past. Such, for example, are the provisions dealing with abandonment of routes (§ 401 (k)), with loans or financial aid from the United States (§ 410), and with criminal penalties. § 902. The Act, however, did not freeze the *status quo* nor attempt to legalize all existing practices. Thus § 401 requires every "air carrier" to acquire a certificate from the Board, a procedure being provided whereby some could obtain "grandfather" rights. By § 401 (h) the Board has authority to alter, amend, modify, or suspend certificates whenever it finds such action to be in the public interest.

Section 409, in regulating interlocking relations between air carriers and other common carriers or between air carriers and those "engaged in any phase of aeronautics," looks not only to the future but to the past as well. For the prohibition is that no air carrier may "have and retain" officers or directors of the described classes. Section 408, which is directed at consolidations, mergers, and acquisition of control over an "air carrier," makes it unlawful, unless approved by the Board, for any "common carrier" to "purchase, lease, or contract to operate the properties" of an "air carrier" or to "acquire control of any air carrier in any manner whatsoever" or to "continue

to maintain any relationship established in violation of any of the foregoing" provisions of § 408 (a). By § 408 (b) a common carrier is taken to be an "air carrier" for the purposes of § 408; and transactions that link "common carriers" to "air carriers" shall not be approved unless the Board finds that "the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

We do not suggest that Grace, a common carrier, need get the Board's approval to continue the relationship it had with Panagra when the 1938 Act became effective.[6] It is clear, however, that the Board under § 411 of the 1958 Act has jurisdiction over "unfair practices" and "unfair methods of competition" even though they originated prior to 1938.

That section provides:

> "The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent *has been or is engaged in unfair* or deceptive *practices* or *unfair methods of competition in air transportation* or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such *unfair* or deceptive *practices* or *unfair methods of competition,* it shall order *such air carrier,* foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition." (Italics added.) 49 U. S. C. § 1381.

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[6] The Board has held that § 408 (a) is not retroactive. *Railroad Control of Northeast Airlines,* 4 C. A. B. 379, 386. And see *National Air Freight Forward. Corp.* v. *C. A. B.,* 90 U. S. App. D. C. 330, 335, 197 F. 2d 384, 389.

The words "has been or is engaged in unfair . . . practices or unfair methods of competition" plainly include practices started before the 1938 Act and continued thereafter [7] as well as practices instituted after the effective date of the Act.

The parentage of § 411 is established. As the Court stated in *American Airlines* v. *North American Airlines*, 351 U. S. 79, 82, this section was patterned after § 5 of the Federal Trade Commission Act,[8] and "[w]e may profitably look to judicial interpretation of § 5 as an aid in the resolution of . . . questions raised . . . under § 411." As respects the "public interest" under § 411, the Court said:

> ". . . the air carriers here conduct their business under a regulated system of limited competition. The business so conducted is of especial and essential concern to the public, as is true of all common carriers and public utilities. Finally, Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry." *Id.*, 84.

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[7] The Sherman Act was applied to pre-1890 combinations: *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 342; *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107–108 (Texas version of the Sherman Act); see also *Cox* v. *Hart*, 260 U. S. 427, 435; *American P. & L. Co.* v. *Securities & Exchange Comm'n*, 141 F. 2d 606, 625 (C. A. 1st Cir.), affirmed, 329 U. S. 90.

Moreover, as we recently stated in *United States* v. *duPont & Co.*, 353 U. S. 586, 607, ". . . the test of a violation of § 7 is whether, *at the time of suit*, there is a reasonable probability that the acquisition is likely to result in the condemned restraints." (Italics added.)

[8] The original Act took out from under the jurisdiction of the Federal Trade Commission, "air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938." 52 Stat. 973, 1028, § 1107 (f).

The Board in regulating air carriers is to deal with at least some antitrust problems. Apart from its power under § 411, it is given authority by §§ 408 and 409, as already noted, over consolidations, mergers, purchases, leases, operating contracts, acquisition of control of an air carrier, and interlocking relations. Pooling and other like arrangements are under the Board's jurisdiction by reason of § 412. Any person affected by an order under §§ 408, 409 and 412 is "relieved from the operations of the 'antitrust laws,' " including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board. 52 Stat. 973, 1028, § 1107 (g); 15 U. S. C. § 21.

There are various indications in the legislative history that the Civil Aeronautics Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned.

The House Report stated:

> "It is the purpose of this legislation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air-transportation industry in the United States." H. R. Rep. No. 2254, 75th Cong., 3d Sess., p. 1.

No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations,[9] to hold that

[9] Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, holding that the Interstate Commerce Act is no bar to an antitrust suit against a carrier; *United States* v. *R. C. A.*, 358 U. S. 334, holding that the Federal Communications Act is no bar to an antitrust suit against TV and radio licensees; *United States* v. *Borden Co.*, 308 U. S. 188, 195–199, holding that neither the Agricultural Adjustment Act nor

the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocally declared congressional purpose so to do. While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 105. Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce.

That does not, however, end our inquiry. Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers.[10] The case is therefore quite unlike *Georgia* v. *Pennsylvania R. Co., supra,* where a conspiracy among carriers for the fixing of through and joint rates was held to constitute a cause of action under

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the Capper-Volstead Act displaced the Sherman Act; and *California* v. *Federal Power Comm'n,* 369 U. S. 482, holding that the Clayton Act was not displaced by the Natural Gas Act. And see *Milk Producers Assn.* v. *United States,* 362 U. S. 458.

[10] In *Pan American-Matson-Inter-Island Contract,* 3 C. A. B. 540, the Board rejected a proposal for the creation of a joint company similar to Panagra for service to Hawaii. Such joint ventures, as we note in the opinion, may be combinations in violation of the antitrust laws. See *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598.

the antitrust laws, in view of the fact that the Interstate Commerce Commission had no power to grant relief against such combinations.[11] And see *United States* v. *R. C. A.*, 358 U. S. 334, 346. And the present Act does not have anything comparable to the history of the Capper-Volstead Act, which we reviewed in *Milk Producers Assn.* v. *United States,* 362 U. S. 458, and which showed that farmer-producers were not made immune from the class of predatory practices charged in that civil suit as antitrust violations. *Id.*, pp. 464–467.

The words "unfair . . . practices" and "unfair methods of competition" as used in § 411 contain a "broader" concept than "the common-law idea of unfair competition." *American Airlines* v. *North American Airlines, supra,* 85. They derive, as already noted, from the Federal Trade Commission Act; and their meaning in the setting of that Act has been much discussed. They do not embrace a remedy for private wrongs but only a means of vindicating the public interest. *Federal Trade Comm'n* v. *Klesner,* 280 U. S. 19, 25–30. The scope of "unfair practices" and "unfair methods of competition" was left for case-by-case definition. The Senate Report stated:

> "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of

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[11] It should be noted that the result in *Georgia* v. *Pennsylvania R. Co., supra,* might today be different as a result of the Act of June 17, 1948, 62 Stat. 472, which gives the Interstate Commerce Commission authority to approve combinations of the character involved in that case and give them immunity from the antitrust laws. See S. Rep. No. 1511, 79th Cong., 2d Sess.; H. R. Rep. No. 1212, 79th Cong., 1st Sess.; H. R. Rep. No. 1100, 80th Cong., 1st Sess. This Act was passed over a presidential veto. See 94 Cong. Rec. 8435, 8633.

> the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." S. Rep. No. 597, 63d Cong., 2d Sess., p. 13.

The legislative history was reviewed in *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 649–650, the Court concluding that "unfair competition was that practice which destroys competition and establishes monopoly." *Id.*, 650. The provision was designed to supplement the Sherman Act by stopping "in their incipiency those methods of competition which fall within the meaning of the word 'unfair.' . . . All three statutes [the Sherman and Clayton Acts and § 5] seek to protect the public from abuses arising in the course of competitive interstate and foreign trade." [12] *Id.*, 647. See *Federal Trade Comm'n* v. *Beech-Nut Co.*, 257 U. S. 441, 453–454; *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 310–312; 2 Toulmin's Anti-Trust Laws (1949) § 43.6. Joint ventures may be combinations in violation of the antitrust laws. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598. Whatever the unfair practice or unfair method employed, § 411 of this Act, like § 5 of the Federal Trade Commission Act (*Federal Trade Comm'n* v. *Motion Picture Adv. Co.*, 344 U. S. 392, 394–395), was designed to bolster and strengthen antitrust enforcement.

We have said enough to indicate that the words "unfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and

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[12] And see the debates in 51 Cong. Rec. 11874–11876; 12022–12025; 12026–12032

the impact of particular practices on competition and monopoly.

These words, transferred to the Civil Aeronautics Act, gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes. Cf. *American Power Co.* v. *Securities & Exchange Comm'n,* 329 U. S. 90, 104–105. That regime has its special standard of the "public interest" as defined by Congress. The standards to be applied by the Board in enforcing the Act are broadly stated in § 2:

> "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—
>
> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics." 52 Stat. 980. And see 49 U. S. C. § 1302.

The "present and future needs" of our foreign and domestic commerce, regulations that foster "sound economic conditions," the promotion of service free of "unfair or destructive competitive practices," regulations that produce the proper degree of "competition"—each of these is pertinent to the problems arising under § 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the "public interest" as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U. S. C. § 1486. Cf. *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U. S. 481; *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83.

In case of a prospective application of the Act, the Board's order, as noted, would give the carrier immunity from antitrust violations "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." § 414. Alternatively, the Board under § 411 can investigate and bring to a halt all "unfair . . . practices" and all "unfair methods of competition," including those which started prior to the Act.[13]

[13] We note, in addition, that the Board itself has assumed jurisdiction under changed circumstances in those areas covered by § 408, in which it has found only prospective authority. *Railroad Control of Northeast Airlines, supra,* note 6.

If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide. Furthermore, many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations that the Act, as construed by a majority of the Court in *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, subjects to presidential rather than judicial review. It seems to us, therefore, that the Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers.[14] See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156.

The fact that transactions occurring before 1938 are involved in this case does not change our conclusion. The past is prologue and the impact of pre-1938 transactions on present problems of air carriers is eloquently demonstrated in a recent order of the Board concerning the United States flag carrier route pattern between this country and South America which is set forth in part in the Appendix to this opinion. The status of Panagra—

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[14] An "air carrier" is defined in § 1 (2) as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest." Whether there might be "a reasonable basis in law" (*Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131) for a Board conclusion that Grace is an "air carrier" by reason of its negative control over Panagra is a matter on which we intimate no view. We mention the matter so as not to foreclose the question by any implication drawn from our separate treatment of common carriers and air carriers.

jointly owned by Pan American and Grace—is central to that problem,[15] as that order makes clear. What was done in the pre-1938 days may be so disruptive of the regime visualized by the Act or so out of harmony with the statutory standards for competition set by the Act [16] that it should be undone in proceedings under § 411. The transactions in question are reached by the terms of § 411. But more important, the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the Board should decide whether these particular transactions should be undone in whole or in part, or whether they should be allowed to continue.

It is suggested that the power of the Board to issue a "cease and desist" order is not broad enough to include the power to compel divestiture and that in any event its power to do so under § 411 runs solely to air carriers, not to common carriers or other stockholders. We do not read the Act so restrictively. The Board has no power to award damages or to bring criminal prosecutions. Nor does it,

[15] Phases of issues related to those in the present litigation have indeed been before the Board. Note 5, *supra*. It held in an investigation that it had no authority to accomplish the compulsory extension of Panagra's route to the United States (*Panagra Terminal Investigation*, 4 C. A. B. 670), a ruling reviewed by the Court of Appeals which remanded the matter to the Board for further consideration. *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 271. Before that controversy had been resolved, Pan American and Panagra entered a "through flight agreement" which in essence provided that Pan American would charter any aircraft operated by Panagra from the south to the Canal Zone and operate it on its schedules to the United States. This agreement, with exceptions not material here, was approved by the Board. *Pan American-Panagra Agreement*, 8 C. A. B. 50.

[16] For a discussion of the Board's policy in issuing certificates to competing air carriers, see Hale and Hale, Competition or Control IV: Air Carriers, 109 U. of Pa. L. Rev. 311, 314–318.

as already noted, have jurisdiction over every antitrust violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand.

We need not now determine the ultimate scope of the Board's power to order divestiture under § 411. It seems clear that such power exists [17] at least with respect to the particular problems involved in this case. Of principal importance here, we think, is the fact that the Board could have retained such power over these transactions, if they had occurred after 1938, by so conditioning its grant of approval. The terms of § 411 do not distinguish between conduct before or after that date. If the Act is to be administered as a coherent whole, we think § 411 must include an equivalent power over pre-enactment events of the kind involved in this case [18]—although, of course,

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[17] We have heretofore analogized the power of administrative agencies to fashion appropriate relief to the power of courts to fashion Sherman Act decrees. *Federal Trade Comm'n* v. *Mandel Bros.*, 359 U. S. 385, 392–393. Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees (*Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 433, 436; *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385) subject of course to judicial review. Dissolution of unlawful combinations, when based on appropriate findings (*Schine Theatres* v. *United States*, 334 U. S. 110, 129–130), is an historic remedy in the antitrust field, even though not expressly authorized. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. Likewise, the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority, as we held only the other day in *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115. Cf. *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619.

[18] There is no express authority for divestiture in either the Sherman or Clayton Act. See 15 U. S. C. §§ 4, 25. The reasoning that supports such a remedy under those Acts is as applicable to the

the Board might find that the historic background of these pre-1938 transactions introduces different considerations in formulating a suitable resolution of the problem involved.

We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed.[19] Accordingly we reverse the judgment and remand the case for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post*, p. 319.]

Board as it is to the courts, and it is as valid today as it was when originally stated by the first Justice Harlan:

"All will agree that if the . . . Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344.

[19] If it were clear that there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C. A. B., we would have the kind of problem presented in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, *ante*, p. 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, so that the judicial remedy, not available in the other proceeding, can be granted. Nor is this a case where a proceeding before a second tribunal is desirable (*Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478) or necessary (*General Am. Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 150–151) for an authoritative determination of a legal question controlling in the first tribunal.

Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Far East Conference* v. *United States*, 342 U. S. 570, 577.

APPENDIX TO OPINION OF THE COURT.

Order No. E–17289

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on the
8th day of August, 1961.

In the matter of the
United States-South America Route Case } Docket 12895

ORDER INSTITUTING INVESTIGATION

The Board has decided that it is appropriate at this time to institute a comprehensive review of the U. S. flag carrier route pattern between the United States and South America. The most recent extensive study of that route structure was undertaken in 1946, some 15 years ago. Since then considerable developments, hereinafter referred to, have taken place which affect these services and require the review here contemplated.

Three U. S. carriers are presently certificated to provide the major services to points in South America. Pan American World Airways, Inc. (Pan American), is authorized to provide service between San Francisco, Los Angeles, Houston, New Orleans, Washington, Philadelphia and New York-Newark, on the one hand, and points on the north and east coasts of South America including Rio de Janeiro and Buenos Aires, on the other hand, via points in Central America and the Caribbean, on route 136. Pan American-Grace Airways, Inc. (Panagra) is authorized to provide service between Balboa, Guayaquil, Lima, Santiago and Buenos Aires, via intermediate points,

primarily along the west coast of South America, on route 146. Braniff Airways, Inc. (Braniff) is authorized to provide service between Houston and Miami, on the one hand, and Havana, Balboa, Bogota, Guayaquil, Lima, Rio de Janeiro and Buenos Aires, on the other hand, via intermediate points, on route FAM–34.[1]

As previously indicated, the basic U. S. flag carrier route patterns between the United States and South America presently in effect were established some years ago in the *Additional Service to Latin America Case*, 6 C. A. B. 857 (1946). Matters involving service between the United States and South America were, however, further considered in the *New York-Balboa Through Service Proceeding, Reopened*, 18 C. A. B. 501 (1954), 20 C. A. B. 493 (1954), and certain through-service aircraft interchange agreements were approved as a result of the *New York-Balboa* case by Order E–9481, 21 C. A. B. 1005 (1955). Also, the certification of a Los Angeles/San Francisco-Guatemala City route, last considered in Order E–9514, August 3, 1955, permitted Pan American to operate between the west coast of the United States and points in South America.

Since the original establishment of the basic South America route structure, there have been basic changes in technology and patterns of service. Thus, in 1944, the range of aircraft was relatively limited and operational requirements, as well as economic considerations, required multiple stops on the long-haul service. Today, available aircraft can, and do, serve the most distant points on a

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[1] Delta Air Lines, Inc. (Delta) is authorized to serve Caracas and certain Caribbean points on its Caribbean route 114 from Houston and New Orleans; and Aerovias Sud Americana, Inc. (ASA) is authorized to provide cargo and mail service (on a nonsubsidy basis) between Florida points and points in Central and South America. The only South American points presently served by ASA are Quito and Guayaquil, Ecuador.

nonstop basis. Of the relative attractiveness of nonstop to multi-stop service in comparable equipment there can be no question; consequently, the changed technology which has made nonstop services operationally feasible warrants a careful review of the economics of such service in relation to the existing and future route structure. Similarly, changes have taken place in the competitive picture. Prior to the decision in the *Latin America Case, supra,* Pan American and Panagra operated in competition with three foreign air carriers. Today, 19 South American foreign air carriers are authorized to serve the United States-South America market. There has also been an increase in service within South America by local carriers. Not only do these services rendered by non-U. S. flag carriers dilute the potential economic support for the services of the U. S. carriers, but also they bring into question the need for point-to-point duplication of such services. In this connection, we cannot be unmindful of the fact that the U. S. flag carriers' operations are marginal economically.

Our concern with the current South America route pattern is not a recent one. As long ago as 1954, the Board publicly suggested that the available traffic in South America did not warrant continuation of three United States flag services.[2] In the Interim Opinion in the *New York-Balboa* case, *supra,* it was noted that Braniff was not an effective competitor for South American traffic and that the public interest of the United States would be served by the establishment of a single independent carrier operation between Houston and Miami, on the one hand, and the points served on the combined routes of Panagra and Braniff, on the other hand. The Board then also voiced its interest in making

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[2] *Reopened New York-Balboa Through Service Case,* 18 C. A. B. 501.

such a route available to northeastern United States traffic. The hope then was that the carriers concerned would voluntarily seek to resolve the problem along the lines suggested.[3] In this connection, we were fully cognizant of the recent institution of a suit by the Attorney General against Pan American, Panagra, and W. R. Grace and Company, which, on antitrust grounds, sought divestiture by Pan American and Grace of their interest in Panagra. However, the principals did not come forward with a proposal. Instead, the suit was permitted to proceed to trial and judgment, and it is currently pending possible review by the United States Supreme Court.[4]

Assuming that the District Court's judgment, at least insofar as it ordered divestiture by Pan American of its interest in Panagra, is sustained,[5] it is clear that the Board will, in the near future, be called upon to consider further the consequences of divestiture with respect to U. S. flag services in South America. And in order for the Board to be able promptly and effectively to take such further steps as might be required in the circumstances, it would be well for it to have considered carefully the overall need for U. S. flag services in South America in the light of a litigated record.

Since the selection of carrier issues will remain somewhat clouded until final resolution of the pending anti-

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[3] The powers granted the Board in the Federal Aviation Act of 1958 and its predecessor, the Civil Aeronautics Act of 1938, do not include authority to compel merger, or to terminate the entire route of a carrier.

[4] The District Court for the Southern District of New York handed down a decision on May 8, 1961, *U. S.* v. *Pan American World Airways, Inc., W. R. Grace and Company, and Pan American-Grace Airways, Inc.,* Civ. 90–259. Pan American filed a notice of appeal in the Supreme Court on May 11, 1961.

[5] The Attorney General had sought divestiture by both Grace and Pan American.

trust suit, it appears appropriate and in the interest of a sound and orderly disposition of this proceeding to consider separately the appropriate route structure prior to consideration of selection of carrier matters. We recognize that factual matters relative to public convenience and necessity issues may also have their carrier selection aspects; similarly, we are not unmindful of the fact that, while the prescribed route pattern can be established in substantial part without regard to carrier selection, some adjustment in route pattern may be found necessary at the time we decide the carrier selection issues. We anticipate, however, the full cooperation of all concerned to facilitate an appropriate separation of these issues.

The Board intends that the scope of the proceeding instituted herein include issues with respect to authorization of services to new points, the deletion of presently certificated points, and the consolidation of separate routes into single routes.[6] Caribbean points will be considered only to the extent that they are in issue as possible intermediate points on United States-South America routes, and the proceeding will not examine services wholly within the Caribbean area, or between points in the United States and the Caribbean.

In its study of the South American route pattern, the Board has tentatively concluded that an east coast route and a west coast route are required. The details of the routes are set forth in the attached analysis. In addition, and because we have found that considerable route modifications are necessary to meet present needs and problems, we have compiled and attached hereto data which

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[6] Pending certificate applications involving service between the United States and South America will be considered for consolidation upon appropriate request submitted within 20 days of the date of service of this order. Applications not moved for consolidation will be subject to dismissal for lack of prosecution.

we believe will facilitate hearing and decision. The attached materials should serve as the focal point for the trial of this case, and we direct that the presentation of participants in the proceeding, unless otherwise ordered by the Board upon good cause shown therefor, be pointed to showing why and in what manner the conclusions derived from the study should be modified. Such an approach can restrict the hearing to relevant and material facts and otherwise minimize procedural delay.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE concurs, dissenting.

The Court holds that the "narrow questions presented by this complaint have been entrusted to the [Civil Aeronautics] Board and that the complaint should have been dismissed." The ground of the decision is that the provisions for economic regulation in the Civil Aeronautics Act of 1938, which were reenacted without change in the Federal Aviation Act of 1958, displaced the Sherman Act insofar as "all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers" is concerned. With all respect, I think this conclusion is contrary to reason and precedent.

I.

The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other. As a result of today's decision, certain questions under the antitrust laws are placed in the exclusive competence of the Board and will not be the subject of original court actions to enforce the antitrust laws. In effect, a

pro tanto repeal of the antitrust laws is contemplated, since the law to be applied in Board proceedings under § 411 is based not upon the antitrust laws but upon the "public interest" and "competition to the extent necessary" standards of the Board's overall mandate. See 49 U. S. C. § 1302. And though the Board's decisions under § 411 are subject to judicial review, presumably such review will be limited to ensuring that the Board adheres to the criteria set out in its mandate. See *American Airlines, Inc.*, v. *North American Airlines, Inc.*, 351 U. S. 79, 85.

But of the instruments of accommodation that are available, *pro tanto* repeal of the antitrust laws by implication from a regulatory statute such as the Aeronautics Act is surely the very last that ought to be resorted to. It cannot be justified as a matter of statutory construction. Section 414 of the Act immunizes from the operation of the antitrust laws transactions as to which the Board has issued orders of approval under §§ 408, 409, and 412 (consolidations and mergers, interlocking directorates, and cooperative working arrangements). The existence of this express and specific provision for exemption would seem to presuppose the general applicability of the antitrust laws to the airline industry, and to limit the Board's exempting power to the enumerated orders, which do not include orders issued under § 411; the Court concedes that the Board has no power under §§ 408, 409, or 412 to approve the transactions upon which the instant suit is predicated. Furthermore, it is odd indeed that the Board should have express statutory authorization to enforce §§ 2, 3, 7, and 8 of the Clayton Act (see 15 U. S. C. § 21) while the Sherman Act is not enforceable by any procedure with respect to the wide range of transactions comprised in the rule laid down by the Court today. It is odd because the Clayton Act was intended to supplement and reinforce the basic antitrust prohibitions of the Sher-

man Act, rather than to form an independent and self-sufficient scheme of regulation. By its action today, the Court subjects the airline industry to a crazy quilt of antitrust controls that Congress can hardly have contemplated.

Two further aspects of the Aeronautics Act cut against the Court's interpretation. The first is the presence of a saving clause: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U. S. C. § 1506. The second is the total absence from the Act of any provision for damages or reparations. This *lacuna* leads the Court, somewhat unusually in light of certain prior decisions,[1] to intimate that the damages remedy under the antitrust laws survives where the injunctive remedy is barred—an impractical solution, as I shall try to demonstrate, see *infra,* pp. 326–327. The more reasonable interpretation of the absence of a provision for damages is that the Act was not intended to be an absolutely all-inclusive scheme of regulation which would oust every remedy afforded by a different statute or by the common law. The antitrust laws were to be allowed to function, save as regards the specific exemptions provided for in § 414, and these laws would support actions for damages and for equitable relief.

I am satisfied that the scheme of the Aeronautics Act refutes any inference that *pro tanto* repeal of the antitrust laws was intended. Nor does the legislative history furnish any support for the Court's position. The Court cites but a single sentence: "It is the purpose of this legis-

[1] See *T. I. M. E. Inc.* v. *United States,* 359 U. S. 464, and cases cited therein. At least one Federal Court of Appeals has held that the CAB's lack of power to award money reparations leaves open a court action for damages sounding in tort. *Fitzgerald* v. *Pan American World Airways, Inc.,* 229 F. 2d 499 (C. A. 2d Cir. 1956).

lation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics . . . ." H. R. Rep. No. 2254, 75th Cong., 3d Sess., p. 1. Prior to the enactment of the Aeronautics Act of 1938, the regulation of civil aviation had been divided between the Interstate Commerce Commission, the Department of Commerce, and the Post Office Department; and the plain meaning of the quoted sentence, especially in light of the debates that preceded passage of the Act, is that as a result of the Act regulation of civil aviation would be centralized in one agency, the CAB. See Hearings on H. R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., p. 37.

But a still more conclusive refutation of the Court's reading of the Act is provided by an unbroken chain of decisions by this Court rejecting, in comparable situations, claimed *pro tanto* repeals by implication of the antitrust laws. Perhaps the leading case is *United States* v. *Borden Co.*, 308 U. S. 188, 197–206, where the Court held emphatically that the enactment of a regulatory statute would not be deemed to work a *pro tanto* repeal of the antitrust laws, save only if there was a plain repugnancy between the two regimes (which the Court does not suggest, except in the vaguest conclusional terms, is the case here), in which case repeal would be implied only to the extent of the repugnancy. But the holding of the *Borden* case had been anticipated in much earlier decisions of the Court. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 314–315; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 161–162; *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U. S. 469, 474–475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513–515. See also *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 107–108. And the

canon of construction that repeals by implication are not favored has even a longer history in this Court's jurisprudence. See, *e. g., United States* v. *Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652.

Georgia v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457, strongly reaffirmed the *Borden* principle in the context of a regulatory scheme, the Interstate Commerce Act, no less pervasive than that which governs the airline industry. I believe it is accurate to say that the Court had never until today deviated from this position. See *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 205–206; *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797; *United States* v. *Radio Corp. of America,* 358 U. S. 334; *Maryland & Va. Milk Producers Assn.* v. *United States,* 362 U. S. 458, 464–466; *California* v. *Federal Power Comm'n,* 369 U. S. 482. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226–227; *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U. S. 481. Only last Term, in *California* v. *Federal Power Comm'n, supra,* we wrote: "Immunity from the antitrust laws is not lightly implied. . . . We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one. See *United States* v. *Borden Co.,* 308 U. S. 188, 198–202." 369 U. S., at 485.

Furthermore, although this Court had not until today passed on the question whether the Aeronautics Act repealed by implication any part of the antitrust laws, the lower federal courts have uniformly held that it did not. See *S. S. W., Inc.,* v. *Air Transport Assn.,* 89 U. S. App. D. C. 273, 191 F. 2d 658 (1951), cert. denied, 343 U. S. 955; *Apgar Travel Agency, Inc.,* v. *International Air Transport Assn.,* 107 F. Supp. 706 (D. C. S. D. N. Y. 1952); *Slick Airways, Inc.,* v. *American Airlines, Inc.,* 107 F. Supp. 199 (D. C. D. N. J. 1951), petition for prohibition dismissed *sub nom. American Airlines* v. *Forman,* 204 F. 2d 230

(C. A. 3d Cir. 1953), cert. denied *sub nom. American Airlines, Inc.*, v. *Slick Airways, Inc.*, 346 U. S. 806.

Finally, it has been held that § 411 of the Aeronautics Act was modeled on § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, and that decisions under § 5 are precedents for the construction of § 411. *American Airlines, Inc.*, v. *North American Airlines, Inc.*, 351 U. S. 79, 82. And § 5 has uniformly been construed to provide for dual enforcement by courts and agency of the antitrust laws, not exclusive enforcement by the agency. *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 205–211; *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 692–695; *United States* v. *Charles Pfizer & Co.*, 205 F. Supp. 94 (D. C. S. D. N. Y. 1962); *United States* v. *Cement Institute*, 85 F. Supp. 344 (D. C. D. Colo. 1949).

In light of this decisional history, it cannot be supposed that Congress, when it first enacted a scheme of comprehensive economic regulation of the airline industry in 1938 and when it reenacted these economic provisions without change in 1958, intended any displacement of the antitrust laws beyond that specifically provided for in § 414. Nor did the decisions I have cited rest upon the mechanical application of one of the common law's canons of statutory construction. However questionable the principle that repeals by implication are not favored may be in other contexts, it is entirely sound when dealing with the antitrust laws, and especially the Sherman Act. For this Act embodies perhaps the most basic economic policy of our society, basic and continuing: abhorrence of monopoly. The kind of conduct proscribed by the Sherman Act is simply not such that congressional silence may be interpreted as congressional approval. Where, as here, neither the scheme of the regulatory statute nor anything in the legislative history supports a *pro tanto* repeal by implication of the Sherman Act, it

seems to me inescapable that we must reject such a solution. Nor can it be seriously contended that on the facts of the instant case judicial enforcement of the antitrust laws would disrupt, even slightly, the Board's regulation of civil aviation. See Part III, p. 327, *infra.* And since no question of certification for foreign air carriage is involved, there is no danger of court interference in matters committed to the President's discretion by 49 U. S. C. § 1461.

II.

The decision today is, to me, not only unsound in law, but impractical. The Court purports to lay down a general rule governing the division of responsibilities between the courts and the CAB; and while certain antitrust questions, including those at bar, are to be withdrawn from the courts, others are to remain subject to judicial enforcement. I consider the Court's proposed line of demarcation between the judicial and administrative regimes unsupportable. I see no basis upon which to withdraw questions of route allocation, territorial division, and combinations between common carriers and air carriers from judicial cognizance, yet leave unaffected (as the Court appears to intend to do) questions of rate fixing, combinations between air carriers *simpliciter,* and other serious anticompetitive practices. By what arcane logic does a conspiracy to fix routes go more to the heart of the regulatory scheme than a conspiracy to fix rates? True, the Board, while it has authority to fix routes in foreign air transportation, has no authority to fix rates therein; but the Act broadly prohibits all forms of unjust discrimination, which of course would embrace many rate-fixing practices. See 49 U. S. C. § 1374 (b); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 478, 480 (dissenting opinion). And what justification can there be for the Board's having exclusive jurisdiction of a combination one party to which is probably outside the Board's jurisdic-

tion, see *infra*, pp. 330–331, but not of a combination both parties to which are clearly within the Board's jurisdiction? The only explanation I can conceive for these dubious distinctions is that the Court does not want to go so far as flatly to overrule some well-established decisions of this Court.[2]

I find it equally difficult to understand the Court's apparently limiting its *pro tanto* repeal of the antitrust laws to questions of injunctive relief. It is true that an order of divestiture or some other equitable remedy may be more effective to deter certain antitrust violations than either criminal or damages sanctions. But the difference in effectiveness is one only of degree. An air carrier is not likely to persist in a course of conduct if heavy criminal penalties and awards of treble damages may be visited upon it. But just this possibility the Court seems to allow. I find it hard to follow the Court's attempted justification for mutilating the antitrust laws in terms of avoiding

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[2] See *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 107–108; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 161–162; *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U. S. 469, 475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513–515. The Court's handling of *Georgia* v. *Pennsylvania R. Co.*, *supra*, seems to me particularly disingenuous. The Court concedes that a conspiracy to secure CAB approval of illicit agreements might form the predicate of an antitrust suit, yet nowhere explains why the use of negative control to further a scheme of monopolization by preventing CAB approval of a route extension for Panagra cannot form such a predicate. Furthermore, it is not the case that the ICC was helpless to grant the relief sought in *Georgia* v. *Pennsylvania R. Co.* The Court conceded that the Commission had "authority to remove discriminatory rates of the character alleged to exist here." 324 U. S., at 459. To be sure, the Commission did not have authority to regulate rate-fixing combinations as such. But neither has the CAB authority to prohibit violations of the antitrust laws as such; it is limited by its mandate, so the Court holds, to facilitating "competition to the extent necessary."

clashes between two regimes of law, the administrative and the judicial, when, the mutilation achieved, the clashes remain acutely present. In part, I must conclude that the Court's artificial distinction again was prompted by a desire to skirt, however disingenuously, prior holdings.[3] In addition, the Court had to conjure with the fact that the CAB's statute nowhere provides a remedy, damages or reparations, for past misconduct.

III.

I should also like to suggest the unreality of the Court's decision in the light of the particular circumstances of the instant case. By its decision today the Court brings to naught nine years of litigation. Yet these nine years actually represent only the most recent phase of a continuing problem first placed before the Civil Aeronautics Board 22 years ago.[4] For 22 years Pan American World Airways has staved off the day of reckoning in respect to the tactics which, Judge Murphy found below, violated § 2 of the Sherman Act. Today's decision vindicates these tactics beyond Pan American's fondest expectations, for the problem is now back with the CAB which has from the outset protested its inability to deal with it.

This suit was instituted by the Government at the urging of the CAB, which in addition filed an *amicus curiae* brief in the District Court in support of the Government's

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[3] See *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 105; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 515.

[4] On December 16, 1941, Grace filed a petition with the CAB requesting modification of Panagra's certificate so as to provide for a terminal in the continental United States; on April 29, 1942, Grace requested the Board to proceed under § 411 to order Pan American to divest itself of its holdings in Panagra. See *W. R. Grace & Co.* v. *CAB*, 154 F. 2d 271, 274 (C. A. 2d Cir. 1946), cert. dismissed for mootness *sub nom. Pan American Airways Corp.* v. *W. R. Grace & Co.*, 332 U. S. 827.

position. And repeatedly over a period of many years, the Board has adverted to its felt helplessness in the face of the divided control of Panagra by two powerful corporations, one the dominant United States company in the field of foreign transportation.[5] To be sure, we are not obliged to honor the Board's disinclination to assume jurisdiction. *Trans-Pacific Airlines, Ltd.*, v. *Hawaiian Airlines, Ltd.*, 174 F. 2d 63 (C. A. 9th Cir. 1949). But it is entitled to some weight, see 3 Davis, Administrative Law (1958), 14, and indeed, since the Board's position has been long and consistently adhered to, to great weight. *United States* v. *Radio Corp. of America*, 358 U. S. 334, 350, n. 18. The search for a practical accommodation of court and agency, which is the problem of this case, is not advanced by our ignoring the agency's considered sense of self-limitation.

It is not as if the Board's hesitancy to move against the abuses disclosed by the record in this case were not based upon substantial considerations. We may concede the breadth of the Board's power under § 411 to remedy unfair methods of competition, which may sometimes be violations of the Sherman Act, yet still recognize the unsuitableness of such a remedy in the particular circumstances of this case. For one thing, I should think a proceeding respecting control of Panagra would be rather lopsided unless the Board had jurisdiction of Grace; but I am not sure that could be done. Section 411 only proscribes unfair methods of competition by air carriers and ticket agents. Grace is neither, unless it fits the broad

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[5] See *Panagra Terminal Investigation*, 4 C. A. B. 670, 678 (1944); *Additional Service to Latin America*, 6 C. A. B. 857, 913–914 (1946); *Pan American-Panagra Agreement*, 8 C. A. B. 50, 61 (1947); *New York-Balboa Through Service Proceeding, Reopened*, 18 C. A. B. 501, 504–506 (1954); *Reopened New York-Balboa Through Service Proceeding*, 20 C. A. B. 493, 516–517 (1954). Cf. *New York-Mexico City Nonstop Service Case*, 25 C. A. B. 323 (1957).

language in which the Act defines an "air carrier" as anyone "who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." 49 U. S. C. § 1301 (3). It is not entirely clear that "air carrier" may be read as including a 50% owner of an air carrier, for the Act in general does not purport to regulate stockholders of its subject carriers, and where it does, notably in § 408, it does so explicitly.[6] The opinion of the Court sees fit not to resolve this jurisdictional difficulty. I fear the Board has solid justification for not proceeding against Pan American unless it can proceed against Grace as well. But at all events the Court's silence is sure to result in an added step in this already intolerably prolonged litigation.

A further basis for the Board's hesitancy is that the Board has no experience in the enforcement of the antitrust laws, because § 411 has only been used against common-law unfair competition, never against practices deemed unfairly competitive by virtue of the antitrust laws. Hale and Hale, Competition or Control IV: Air Carriers, 109 U. of Pa. L. Rev. 311, 346–347 (1961).[7] Most of the legal issues which have arisen in the instant litigation—the right of a joint owner to exercise his negative control in an anticompetitive fashion, the substantiality of the commerce restrained as a result of the

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[6] For example:

"It shall be unlawful unless approved by order of the Board as provided in this section—

. . . . . .

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties . . . of any air carrier . . . ." 49 U. S. C. § 1378 (a)(2).

[7] Also, although the CAB has express authority to enforce the Clayton Act, see 15 U. S. C. § 21, I have found no instance of its ever having attempted to do so.

defendants' conduct, the relevant geographical and services markets, the appropriateness of divestiture as a remedy, and so forth—are typical antitrust problems and not at all typical airline law problems. The expertness required is that of the judge skilled in antitrust adjudication—not that of the Board, which, so far as I can tell, has never dealt with an antitrust problem.

Nor is remission of the instant case to the CAB necessary to protect the integrity of the Board's regulatory scheme for the airline industry. Pan American argues that if its holdings in Panagra are divested, Panagra will apply for and be granted terminal points in the continental United States, with the result that Pan American will be driven out of business on many routes, to the serious detriment of the airline industry. But there is more to acquiring a route certificate than applying for it. If Panagra, freed of Pan American's negative control, applies for a northward extension of its routes, it will be open to Pan American to argue before the Board the unwisdom of its granting the application. A judicial order in the instant case would not affect a single route, but would simply free the process whereby routes are established and territories are divided from the obstructive effects of monopolistic tactics. Judicial enforcement of the Sherman Act here would thus remove the clog of monopolization from the administrative process—not disrupt that process. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. The Court's reliance on *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, is misplaced. The plaintiff in *Keogh* sought damages under the antitrust laws, complaining that but for the conspiracy the rates he had paid, though lawful because approved by the ICC, would have been lower. The Court held that the exclusive remedy for excessive rates had been vested by Con-

gress in the ICC. It did not matter on what theory the shipper sought to recover; the courts had no power to undo a lawful rate by granting damages, whether on common-law grounds (as in *Abilene*) or under the antitrust laws. The Court in *Keogh* made very plain, however, that injunctive relief in respect of a conspiracy to raise rates might lie, at least if such relief was sought by the Government, as here. 260 U. S., at 161–162. For (as *Georgia* shows) an injunction may be granted with no disturbance to the existing rate structure.

It should also be noted that the Court's decision today vindicates Pan American's hardly creditable "tactic . . . characteristic of its litigious nature" of first raising the jurisdictional issue in a post-trial brief filed six years after the complaint. 193 F. Supp., at 46. Of course, we are obliged to consider such issues *sua sponte*. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63; Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Col. L. Rev. 673, 690 and n. 114 (1958). But I find it a wry commentary on the Court's result that every factor of fairness and practicality argues against our abdicating jurisdiction of the present case.

IV.

In seeking to accommodate the regulatory and antitrust regimes by means of *pro tanto* repeal of the antitrust laws, the Court does not tell us why it has departed from the usual pattern of preferring a more flexible technique of accommodation: that afforded by the doctrine of primary jurisdiction. See generally 3 Davis, Administrative Law (1958), 1–55. That doctrine requires that the courts abstain from proceeding in a case of which they have original jurisdiction, remitting the parties in the first instance to their rights and remedies before the agency, where neces-

sary to protect the integrity of the regulatory scheme administered by the agency. Such a requirement of prior resort does not preclude a later judicial antitrust proceeding, but simply ensures that the later proceeding will fully recognize the agency's interest in the premises. The antitrust laws are in no wise repealed. Cf. *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U. S. 481, 498–499. This mode of resolving conflicts between court and agency avoids the practical and conceptual difficulties of *pro tanto* repeals by implication. Until today, the Court had never failed to invoke primary jurisdiction in preference to repeal by implication as a means of accommodating the antitrust and regulatory laws; I see no basis for deviation in the instant case from that salutary approach. Certainly the Court suggests none.

I must in candor add that to apply the doctrine of primary jurisdiction to the case at bar would be somewhat of an extension of our decisions in the area, so jealously have we guarded the obligation of judicial enforcement of the antitrust laws. The tendency of the cases has been to invoke the doctrine not when there are simply overlapping judicial and administrative remedies for the same conduct, as is the case here, but only when "there is a possibility that a subsequent administrative decision would approve the questioned activities," as is not true here, since the approval power vested in the CAB by § 414 does not include orders under § 411. Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954). Compare *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, with *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *United States* v. *Radio Corp. of America*, 358 U. S. 334; and *California* v.

Federal Power Comm'n, 369 U. S. 482. See generally Jaffe, Primary Jurisdiction Reconsidered: The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577 (1954). But even if it would take some straining to fit the instant case within the established framework of the law of primary jurisdiction, what the Court has done today is a far graver departure from heretofore settled guideposts of the law.[8]

[8] Since the Court disposed of the case at bar on jurisdictional grounds and did not reach the merits of the antitrust issues, I deem it inappropriate for me to intimate any view of those merits.

BEST ET AL. *v.* HUMBOLDT PLACER MINING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 52. Argued December 10, 1962.—Decided January 14, 1963.

The United States sued in a Federal District Court to condemn any outstanding mining claims on certain public lands needed for the construction of a dam, in order to obtain immediate possession; and the complaint asked that the United States be allowed to reserve authority to have the validity of the mining claims determined in administrative proceedings before the Bureau of Land Management of the Department of the Interior. After being granted a writ of possession, the Government instituted such administrative proceedings for a determination as to the validity of respondents' unpatented mining claims. Respondents thereupon sued to enjoin conduct of the administrative proceedings; but an injunction was denied. *Held:* Institution of the condemnation suit in the District Court was an appropriate way of obtaining immediate possession; it was not inconsistent with the administrative remedy for determining the validity of the mining claims; and the District Court acted properly in holding its hand until the issue of the validity of the mining claims has been resolved by the agency entrusted by Congress with that task. Pp. 334–340.

293 F. 2d 553, reversed.

Roger P. Marquis argued the cause for petitioners. With him on the brief were *Solicitor General Cox, Stephen J. Pollak* and *A. Donald Mileur.*

Charles L. Gilmore argued the cause and filed a brief for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The United States sued in the District Court to condemn certain property needed for the construction of the

Trinity River Dam and Reservoir in California,[1] to obtain immediate possession of it, and to secure title to it, the complaint asking that the United States be allowed to reserve authority to have the validity of mining claims determined in administrative proceedings before the Bureau of Land Management of the Department of the Interior. The District Court allowed the United States a writ of possession; but no other issues in the action have been determined. See 185 F. Supp. 290.

The United States later instituted a contest proceeding in the local land office of the Bureau seeking an administrative determination of the validity of respondents' mining claims [2] and alleged that the land embraced within respondents' claims is nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. Respondents, who had 30 days to answer the administrative complaint or have the allegations taken as confessed,[3] brought the present suit to enjoin the officials of the Department of the Interior from proceeding with the administrative action. The District Court granted summary judgment for the United States. 185 F. Supp. 290. The Court of Appeals reversed, 293 F. 2d 553. The case is here on a petition for certiorari which we granted. 368 U. S. 983.

We deal here with a unique form of property. A mining claim on public lands is a possessory interest in land that is "mineral in character" and as respects which discovery "within the limits of the claim" has been made. *Cameron* v. *United States,* 252 U. S. 450, 456. The discovery must be of such a character that "a person of

[1] See S. Doc. No. 113, 81st Cong., 1st Sess. 120, stating that the project will require 10,000 acres.

[2] See Appeals and Contests Regulation of the Bureau of Land Management, 43 CFR, 1962 Supp., § 221.67.

[3] *Id.,* § 221.64.

ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Castle* v. *Womble,* 19 L. D. 455, 457; *Chrisman* v. *Miller,* 197 U. S. 313, 322; *Cameron* v. *United States, supra,* p. 459. A locator who does not carry his claim to patent does not lose his mineral claim, though he does take the risk that his claim will no longer support the issuance of a patent. *United States* v. *Houston,* 66 L. D. 161, 165. It must be shown before a patent issues that at the time of the application for patent "the claim is valuable for minerals," worked-out claims not qualifying. *United States* v. *Logomarcini,* 60 L. D. 371, 373.

Respondents' mining claims are unpatented, the title to the lands in controversy still being in the United States. The claims are, however, valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met.[4] *Cameron* v. *United States, supra.* The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395.[5] Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them.[6] *Cameron* v. *United States, supra*—an opinion written by Mr. Justice Van Devanter, who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character

[4] 30 U. S. C. §§ 21, 22, 26; General Mining Regulation of the Bureau of Land Management, 43 CFR §§ 185.1–185.3.

[5] See 5 U. S. C. § 485; 43 U. S. C. § 2.

[6] See 30 U. S. C. § 22, 43 U. S. C. § 1201.

and distinction to the administration of the public lands—illustrates the special role of the Department of the Interior in that field. Cameron claimed a valid mineral discovery on public lands. His claim was rejected in administrative proceedings. Cameron, however, would not vacate the land and the United States sued to oust him. The Court said:

> "By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. . . .
>
> "A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> "Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void." 252 U. S. 450, 459–460.

"Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." *Orchard* v. *Alexander*, 157 U. S. 372, 383. If a patent has not issued, controversies over the claims "should be solved by appeal to the land department and not to the courts." [7] *Brown* v. *Hitchcock*, 173 U. S. 473, 477. And see *Northern Pacific R. Co.* v. *McComas*, 250 U. S. 387, 392.

The Court of Appeals wrote nothing in derogation of these principles. It concluded, however, that since the United States went into the District Court to condemn these property interests and to get immediate possession, the validity of the claims was, of necessity, left to judicial determination. Its conclusion rested primarily on Rule 71A of the Federal Rules of Civil Procedure. That Rule, after describing the way in which the issue of compensation shall be determined, concludes with the sentence "Trial of all issues shall otherwise be by the court."

Yet courts that try issues sometimes wait until the administrative agency that has special competence in the field has ruled on them. The controversies within the Court over the appropriateness of that procedure in given situations is well known, though there is no dispute over the soundness of the *Abilene* doctrine, adumbrated by Chief Justice White in *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. It is difficult to imagine a more appropriate case for invocation of the jurisdiction of an administrative agency for determination of one of the issues involved in a judicial proceeding. Cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 146–151.

[7] Claimants today may appeal the Examiner's decision to the Director of the Bureau (43 CFR, 1962 Supp., § 221.1), from him to the Secretary (*id.*, § 221.31), and from there to the courts. *Foster* v. *Seaton*, 271 F. 2d 836.

Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected.[8] The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector.

Respondents protest, saying that if they are remitted to the administrative proceeding, they will suffer disadvantages in that the procedures before the District Court are much less onerous on claimants than those before the Department of the Interior.[9] We express no views on those contentions, as each of them can appropriately be

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[8] We are told that nine hearing Examiners are assigned to mining-claim cases, that mining claims comprise from 75% to 85% of their hearings, and that in the fiscal year 1960–1961, 322 mining-law cases (involving 1,162 separate claims) were brought before the hearing Examiners. Of these, 81 cases (343 claims) were closed on procedural grounds without a hearing; in 241 cases (involving 819 claims), hearings on the merits were held and decisions rendered by the hearing Examiner; in 90 of these cases, appeals were taken to the Director of the Bureau of Land Management.

In the fiscal year 1961 there were a total of 27,228 mining-claim adjudication cases closed during the year. These included 7,457 title-transfer cases (*e. g.*, patent applications and land-disposition conflicts), and approximately 20,000 mining-claim investigations by the Bureau's mining engineers for the purpose of determining validity or invalidity. See Annual Report, Director, Bureau of Land Management, 1961, pt. 4, pp. 86–120 (Statistical Appendix).

[9] Respondents say (1) that in the District Court value would be determined as of the time of the taking, while before the agency value is determined as of the date of the hearing before the Examiner; (2) that the strictures on proof of "discovery" in the administrative proceedings are so great that they could not be satisfied unless the Trinity Basin Reservoir were drained; (3) that in the District Court value could be established by a showing of valuable deposits of gold, while before the Examiner a claim could be established only on proof that mines were actually operating at a profit.

raised in the administrative proceedings and reserved for judicial review.

The United States is not foreclosed from insisting on resort to the administrative proceedings for a determination of the validity of those claims. It may take property pursuant to its power of eminent domain, either by entering into physical possession of the property without a court order, or by instituting condemnation proceedings under various Acts of Congress. *United States* v. *Dow*, 357 U. S. 17, 21. Title to the property passes later, though the entry into possession marks the taking, gives rise to the claim for compensation, and fixes the date as of which the property is to be valued. *Id.*, p. 22. Institution of suit is one way to obtain immediate possession; and we see nothing incompatible between the use of that means to obtain possession and the use of the administrative proceedings to determine title. Cf. *United States* v. *93.970 Acres*, 360 U. S. 328. No purpose would be served by forcing the United States to abandon that orderly procedure in favor of physical seizure, leaving the claimant to a suit under the Tucker Act. See *United States* v. *Dow*, *supra*, p. 21.

We conclude that the institution of the suit in the District Court was an appropriate way of obtaining immediate possession, that it was not inconsistent with the administrative remedy for determining the validity of the mining claims, and that the District Court acted properly in holding its hand until the issue of the validity of the claims has been resolved by the agency entrusted by Congress with the task.

Reversed.

Syllabus.

SHOTWELL MANUFACTURING CO. ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 16. Argued October 11, 15, 1962.—Decided January 14, 1963.

In a jury trial in a Federal District Court, petitioners were convicted in 1953 of willfully attempting to evade federal corporate income taxes. They claim that their privilege against self-incrimination was violated by the admission of evidence obtained as a result of voluntary disclosures made by them in good faith in reliance upon the Treasury's then "voluntary disclosure policy," *i. e.*, that delinquent taxpayers could escape possible criminal prosecution by disclosing their derelictions to the tax authorities before any investigation of them had commenced. After remand by this Court, 255 U. S. 233, the District Court held an additional full evidentiary hearing and again denied suppression of such evidence, finding that "no honest bona fide voluntary disclosure" had ever been made and that fraud had "permeated" petitioners' disclosure showing at both suppression hearings and at the trial. The District Court also denied motions for a new trial and overruled challenges, made for the first time in 1957, to the original grand jury and petit jury arrays. The Court of Appeals sustained these findings and rulings, overruled other challenges to the remand and original trial proceedings, and affirmed the convictions. *Held:* The judgment is affirmed. Pp. 343–367.

1. In view of the facts that no bona fide honest disclosure ever had been made in reliance on the "voluntary disclosure policy" and that the purported disclosure was a further effort to perpetrate a fraud on the Government, admission of the evidence so obtained did not violate petitioners' privilege against self-incrimination. Pp. 346–352.

(a) Rejected as specious is petitioners' suggestion that the District Court's finding of fraud is infirm because the falsity of Shotwell's black-market payments, on which that finding principally rested, was an immaterial consideration in view of the Commissioner's then ruling that black-market payments were not includible in the cost of goods sold. Pp. 346–347.

(b) The Treasury's "voluntary disclosure" policy, addressed to the public generally and not to particular individuals, was not an invitation aimed at extracting confessions of guilt from particular known or suspected delinquent taxpayers, and the privilege against self-incrimination does not apply to disclosures made in reliance on that policy. Pp. 347–349.

(c) Even if petitioners had been initially justified in relying on the Treasury's general offer of immunity, they were no longer entitled to rely upon it when they decided to make a fraudulent disclosure. Pp. 349–350.

(d) What is involved here is not a case of incriminatory evidence having been induced by the Government, but one in which petitioners attempted to hoodwink the Government into what would have been a flagrant misapplication of its voluntary disclosure policy. P. 352.

2. The record does not support petitioners' contention that the District Court should have ordered a new trial because it appeared at the second suppression hearing that an important Government witness had testified falsely at the trial respecting the amount of his black-market payments to the corporate petitioner. Pp. 352–357.

3. There is no truth in petitioners' charges that the remand proceedings were the product of fraud and other gross improprieties on the part of the Government and that they should, therefore, be held for naught. Pp. 357–361.

4. The two lower courts correctly held that petitioners' motions attacking the grand and petit jury arrays, filed more than four years after the trial, were untimely under Federal Rule of Criminal Procedure 12 (b)(2); and their further finding that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries supports the conclusion that a sufficient showing had not been made to warrant relief from the effect of that Rule. Pp. 361–364.

5. The record does not sustain the contention of petitioner Sullivan that he was denied a fair trial because (1) the only specific evidence against him was an alleged admission which a government witness testified Sullivan had made to him, and the government witness had later recanted that testimony; and (2) the trial judge's instructions allowed the jury to consider evidence that had not been admitted against him. Pp. 364–367.

(a) There was ample evidence in the record to carry the case against Sullivan to the jury and to support its verdict of guilt. Pp. 364–365.

(b) There was no error in the trial judge's instructions to the jury that certain evidence was not being admitted against Sullivan and should not be considered against him, and it must be presumed that the jury conscientiously observed such instructions. Pp. 365–367.

287 F. 2d 667, affirmed.

George B. Christensen and *William T. Kirby* argued the cause and filed briefs for petitioners.

Assistant Attorney General Oberdorfer and *Joseph M. Howard* argued the cause for the United States. With them on the brief were *Solicitor General Cox* and *Frank I. Goodman.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case is here for the second time in consequence of the remand that was ordered at the 1957 Term. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233.

In 1953 petitioners were convicted after a jury trial in the United States District Court for the Northern District of Illinois of willful attempted evasion of federal income taxes of the Shotwell Manufacturing Company for the years 1945 and 1946. Int. Rev. Code of 1939, § 145 (b), 53 Stat. 63. The individual petitioners, Cain and Sullivan, were officers of Shotwell, a candy manufacturer. The charge was that the company's tax returns for these years had not reported substantial income, received from one Lubben, on sales of candy above OPA (Office of Price Administration) ceiling prices—so-called black-market sales.

On appeal the convictions were reversed and a new trial ordered by a divided Court of Appeals on the ground that the District Court should have ordered suppressed certain evidence, used at the trial, which petitioners had furnished the Government in reliance on the Treasury's then

"voluntary disclosure policy." 225 F. 2d 394. In substance that policy amounted to a representation by the Treasury that delinquent taxpayers could escape possible criminal prosecution by disclosing their derelictions to the taxing authorities before any investigation of them had commenced. See 355 U. S., at 235, note 2; pp. 348–352, *infra.*

The evidence held subject to suppression consisted of tabulations purporting to show the amount of unreported black-market income received by Shotwell from Lubben during the two tax years in question, and offsetting black-market payments by Shotwell for the purchase of raw materials which almost matched the black-market receipts. Concluding that petitioners' disclosure had been a genuine one (contrary to the District Court's finding) and that it had been made before any investigation of Shotwell's tax returns had started and was thus timely (a question not reached by the District Court, 355 U. S., at 236), the Court of Appeals held that the disclosure was valid and that the Government could not, consistently with the Fifth Amendment, use the disclosed material at petitioners' trial.

The matter then came here for review on the Government's petition for certiorari, during the pendency of which the then Solicitor General moved to remand the case to the District Court for further proceedings on the suppression issue—an issue which both sides recognized had properly been one for the court and not for the jury. 355 U. S., at 244; see *United States* v. *Lustig,* 163 F. 2d 85, 88–89, cert. denied, 332 U. S. 775. The motion was based on the claim that newly discovered evidence in possession of the Government would show that the Court of Appeals' decision as to the *bona fides* and timeliness of the alleged disclosure was the product of a tainted record, involving an attempt on the part of these petitioners "to perpetrate a fraud upon the courts." 355

U. S., at 241. Without reaching any of the questions decided by the Court of Appeals we vacated the judgment of that court and remanded the case to the District Court with instructions to reexamine the disclosure episode in light of the parties' additional evidence and that already in the record, to decide anew the suppression issue, and depending upon its decision to enter a new judgment of conviction or an order for a new trial, as the case might be. 355 U. S., at 245–246.

The District Court, after a full evidentiary hearing, again denied suppression, finding that "no honest, bona fide voluntary disclosure" had ever been made and that fraud had "permeated" the petitioners' disclosure showing at both suppression hearings and at the trial.[1] These ultimate findings rested primarily on subsidiary findings that although Shotwell's black-market *receipts* had not in themselves been misrepresented, the claim that they had been almost entirely offset by *payments* for the purported purchase of black-market supplies was false—the truth being (contrary to what petitioners Cain and Sullivan had testified in the earlier proceedings) that most of Shotwell's black-market receipts, "totaling between three and four hundred thousand dollars," had found their way into the pockets of Cain, Sullivan and Huebner, all Shotwell officers. The District Court also denied motions for a new trial and overruled challenges, made for the first time in July 1957, to the original grand and petit jury arrays.

The Court of Appeals, sustaining these findings and rulings[2] and overruling other challenges to the remand

[1] The court also held that a "dishonest and false disclosure cannot be held to be a timely voluntary disclosure."

[2] In its earlier decision the Court of Appeals rejected petitioners' plea in bar grounded on a claim of immunity. 225 F. 2d, at 397. That claim has not been renewed in their present petition for certiorari, and in any event would not be availing in light of the findings below.

and original trial proceedings, has now affirmed these convictions, 287 F. 2d 667. The case is again before us on certiorari. 368 U. S. 946. We affirm the judgment below.

I.

The principal contention is that notwithstanding the finding that Shotwell's disclosure of black-market receipts was fraudulently contrived, the Self-Incrimination Clause of the Fifth Amendment barred the Government's trial use of any of the disclosed material.[3]

Preliminarily we reject as specious petitioners' suggestion that the District Court's finding of fraud is infirm because the falsity of Shotwell's black-market payments, on which that finding principally rested, was an immaterial consideration in view of the Commissioner's then ruling that black-market payments were not includible in the cost of goods sold—in other words, that Shotwell's tax liability would have remained the same whether or not such expenditures were truthfully represented.[4] The fact is that at the time the disclosure was made the Commissioner's ruling was even then in litigation, and some six months thereafter was rejected by the Tax Court, *Sullenger* v. *Commissioner,* 11 T. C. 1076, as it also was later by several of the Courts of Appeals. See *Commissioner* v. *Weisman,* 197 F. 2d 221 (C. A. 1st Cir.); *Commissioner* v. *Guminski,* 198 F. 2d 265 (C. A. 5th Cir.); *Commissioner* v. *Gentry,* 198 F. 2d 267 (C. A. 5th Cir.); *Jones* v. *Herber,* 198 F. 2d 544 (C. A. 10th Cir.).

Indeed, the record here shows that petitioners, despite the administrative ruling, attempted to negotiate a settlement reflecting a substantial allowance of such expendi-

[3] The Fourth Amendment is also relied on, but that Amendment is manifestly inapposite. See *Centracchio* v. *Garrity,* 198 F. 2d 382, 387, cert. denied, 344 U. S. 866.

[4] The sufficiency of the finding as to the falsity of the expenditures is not attacked.

tures, and that in making their disclosure they reserved the right to contest the ruling by way of a suit for refund, in whole or in part, of the additional taxes to be assessed in respect of the unreported black-market income. Beyond this, had petitioners been able to convince the Treasury that Shotwell's failure to report the black-market receipts had been due to an honest, though mistaken, belief that such income could be offset by black-market expenditures, it might well have borne importantly on their liability for civil fraud penalties. Int. Rev. Code, 1939, § 293 (b).[5] In short, in making their suppression contention petitioners cannot escape the consequences of the finding that their disclosure was fraudulent.

It is of course a constitutional principle of long standing that the prosecution "must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond,* 365 U. S. 534, 541. We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment. See *Bram* v. *United States,* 168 U. S. 532, 542–543; *Hardy* v. *United States,* 186 U. S. 224, 229; *Wan* v. *United States,* 266 U. S. 1, 14; *Smith* v. *United States,* 348 U. S. 147, 150. The controlling test is that approved in *Bram:* " 'a confession, in order to be admissible, must be free and voluntary: that is, . . . not . . . obtained by any direct or implied promises, however slight . . . .' " *Bram* v. *United States, supra,* at 542–543. Evidence so procured can no more be re-

[5] At the trial of this criminal case the District Court charged the jury that it should acquit if it believed that Shotwell's black-market receipts had been used for the purchase of black-market supplies. See 287 F. 2d, at 671, note 7.

garded as the product of a free act of the accused than that obtained by official physical or psychological coercion. But in this instance we find nothing in the circumstances under which the challenged evidence was procured that would run afoul of these jealously guarded constitutional principles.

A coerced confession claim, whether founded on a promise of immunity or otherwise, always involves this question: did the governmental conduct complained of "bring about" a confession "not freely self-determined"? *Rogers* v. *Richmond, supra,* at 544. Under any tenable view of the present situation we think it clearly did not.

The inapplicability here of the constitutional principles relied on by petitioners inheres in both the essential character of this offer of immunity and the particular response of these petitioners to that offer. The offer was nothing more than part of a broad administrative policy designed to accomplish the expeditious and economical collection of revenue by enlisting taxpayer cooperation in clearing up as yet undetected underpayments of taxes, thereby avoiding the delays and expense of investigation and litigation. The Treasury's "voluntary disclosure policy," addressed to the public generally and not to particular individuals, was not an invitation aimed at extracting confessions of guilt from particular known or suspected delinquent taxpayers. Petitioners' position is not like that of a person, accused or suspected of crime, to whom a policeman, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement. In those circumstances an inculpatory statement would be the product of inducement, and thus not an act of free will. No such inference, however, is allowable in the context of what happened here. Petitioners' response, it is true, might not have been made in the absence of the Treasury's offer, but that in itself is not the test. The voluntary disclosure policy left them wholly

free to disclose or not as they pleased. In choosing to act as they did, petitioners, far from being the victims of that policy, were volunteers for its benefits.

Moreover, petitioners were not simply volunteers. Plainly the offer of immunity contained in the voluntary disclosure policy presupposed, at the very least, that a delinquent taxpayer would make a full "clean breast of things." 355 U. S., at 235, note 2. Nothing less satisfies the basic reason for the policy—"taking a sensible step to produce the revenue *called for by law* with the minimum cost of investigation" [6] (emphasis added)—and its most recent official expression at the time this disclosure was made.[7] And the record indeed shows that petitioners could not have understood otherwise.[8] Given these factors the matter then parses down to this: granting that in deciding whether to disclose or run the risk of prosecu-

[6] Address by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, to the Tax Executives Institute, May 14, 1947.

[7] "This [the disclosure policy] presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the *true* tax liability." Press Release of statement by Secretary of the Treasury Snyder, May 25, 1947. (Emphasis added.) In *Centracchio* v. *Garrity*, *supra*, at 389, former Chief Judge Magruder, writing for the First Circuit, recognized that "it would seem that the taxpayer would have to satisfy the court that he made a voluntary, good faith disclosure of all data necessary to a correct computation of his income tax deficiencies . . . ."

[8] Busby, Shotwell's auditor, testified at the trial that he was "acquainted with the published statements of the Treasury" concerning the voluntary disclosure policy and that, in particular, he had brought to petitioners' attention the address by the Chief Counsel of the Internal Revenue Bureau quoted above in part. Cain also testified that Busby had explained the Treasury's policy to him and Sullivan. More particularly, Sauber, the Bureau's representative, testified that at the initial disclosure discussion he told Busby that Shotwell had to reconstruct the figures relating to the black-market receipts and expenditures in order to be able to file an *accurate* amended tax return, and that Cain had represented that "no one in Shotwell Manufacturing Company profited by these transactions."

tion petitioners were initially justified in relying on the Treasury's general offer of immunity, once a fraudulent disclosure had been determined upon they must be deemed to have recognized that such offer had in effect been withdrawn as to them or, amounting to the same thing, that they were no longer entitled to place reliance on it. Petitioners are thus in legal effect left in no better position than they would have been had the Treasury formally withdrawn its offer of immunity before their disclosure figures were furnished. The case, then, is not merely one of volunteers but also one in which the facts disclosed were deliberately misrepresented. Under no acceptable stretch of the *Bram* test can petitioners' disclosure in these circumstances be regarded as the product of unlawful inducement.[9] Its admission into evidence did not offend the Self-Incrimination Clause of the Fifth Amendment.[10]

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[9] The same considerations deprive of even colorable significance the suggestion that Sauber's "assurances" to petitioners, on the occasion of their preliminary inquiry respecting the availability of the Treasury's disclosure policy to an unknown taxpayer in Shotwell's circumstances, should be deemed sufficient to bring their Fifth Amendment claim within the *Bram* test. For apart from the fact that such assurances were no more than an affirmation of the terms of the published disclosure policy of which petitioners were then already well aware, it is clear that what Sauber said was expressly conditioned not merely on a disclosure being "timely" but also on the premise that "the facts . . . [then hypothetically] related to him were correct." As already shown, the falsity of Shotwell's offsetting black-market disbursements was never revealed.

[10] A quite different case would be presented if an offer of immunity had been specifically directed to petitioners in the context of an investigation, accusation, or prosecution. A disclosure made in such circumstances would not have fallen under the voluntary disclosure policy, which by definition was applicable only to disclosures made before any investigation had commenced, and would have been inadmissible in evidence under the *Bram* test. Under the rule of *Rogers* v. *Richmond, supra,* the truth or falsity of such a disclosure would then be irrelevant to the question of its admissibility. We agree that

Finally, relevant cases in the lower federal courts confirm the view that must be reached on principle. In the comparable situation of a disclosure by a taxpayer made only after he knew an investigation of his tax returns had commenced, such courts have consistently, and correctly we think, refused to suppress the Government's use of disclosed evidence on the ground that the disclosure could not have been induced by the offer of immunity where the offer had lapsed. *United States* v. *Lustig,* 163 F. 2d 85, 88–89 (C. A. 2d Cir.), cert. denied, 332 U. S. 775; *White* v. *United States,* 194 F. 2d 215, 217 (C. A. 5th Cir.), cert. denied, 343 U. S. 930; *Bateman* v. *United States,* 212 F. 2d 61, 65–66 (C. A. 9th Cir.) (suppression also denied because disclosure not "full and complete"); *United States* v. *Weisman,* 78 F. Supp. 979 (D. C. Mass.). Similarly a dishonest disclosure cannot be deemed to have been so induced.

Petitioners rely on *Rex* v. *Barker,* [1941] 2 K. B. 381, 3 All Eng. 33 (more fully reported there), a decision of the King's Bench Division holding inadmissible in a criminal trial documents, in part fraudulent, which the defendant had produced under a similar British disclosure policy. But that case does not support their position. For though the defendant there had first made only a partial and misleading disclosure, he had then followed it up with a full and honest one, after further discussions with the Inland Revenue and in reliance on its disclosure policy. In the case before us no full and honest disclosure was ever made.

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the rule of that case, involving a state trial, is equally applicable in a federal prosecution.

The case would also be different had the petitioners, acting under the voluntary disclosure policy, made an honest disclosure. Whether or not different constitutional principles or other considerations would then prevent the Government from reneging on its promise by using such material as evidence in a criminal trial need not now be decided. Cf. *Smith* v. *United States,* 348 U. S. 147.

Since no element of coercion or inducement, in any true sense of those terms, attended petitioners' disclosure, no inroad whatever upon constitutional rights is wrought by our rejection of this suppression claim. On the contrary, to sustain the claim would amount to turning an important constitutional principle upside down. For what we have here is not a case of incriminatory evidence having been induced by the Government, but one in which petitioners attempted to hoodwink the Government into what would have been a flagrant misapplication of its voluntary disclosure policy.

II.

Claiming that it appeared at the second suppression hearing that Lubben, whose transactions with Shotwell formed the basis of the charges in the indictment, had testified falsely at the trial respecting the amount of his black-market payments, petitioners contend that the District Court should have ordered a new trial of the entire case. The Court of Appeals made short shrift of this contention (287 F. 2d, at 675), and we too find no substance in it.

The cornerstone of petitioners' argument is a statement made by the District Court in the course of its suppression opinion: ". . . that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable." This statement is sought to be portrayed as a euphemism for a finding that Lubben's trial testimony was perjurious. Were that so a new trial might well be in order, as the Government acknowledges, for Lubben was undoubtedly a crucial government witness. But the record both demonstrates the hollowness of that contention and affords no other basis for disturbing the conclusions of the two lower courts that these petitioners are not entitled to a new trial.

Far from constituting a finding of perjury, the District Court's remark respecting Lubben's trial testimony was nothing more than part of a general observation that the passage of time and the absence of any contemporary records of the Shotwell-Lubben transactions made difficult the pin-pointing of the exact amount of Shotwell's unreported black-market income and the amount thereof that was personally kept by one or another of the Shotwell officers. The suppression record makes clear that the District Court did not initially address itself to the question whether Lubben's trial testimony was perjurious, and that it was not asked to do so until after its opinion denying suppression had come down.

To the contrary, the District Court had not considered it important to determine the precise amounts of Lubben's black-market payments or of the moneys that were retained by Huebner, Sullivan and Cain. It was enough that "the evidence is overwhelmingly clear that not only were" some $300,000 to $400,000 of black-market payments made to Shotwell by Lubben in the period 1944–1946, but also that "the greater part" of this money "was appropriated by Cain, Huebner and Sullivan for their own personal use." [11]

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[11] The following is the full text of this portion of the District Court's opinion: "Some fourteen years have elapsed since the black-market operations of Shotwell took place. No record was kept by Shotwell or any of its officials as to the premium moneys paid by Lubben and his companies during the years in question. It is conceded that thousands of dollars were paid to Shotwell by Lubben and his representatives as black-market payments on candy sold to Lubben and his companies during 1945 and 1946 without any attempt on the part of Shotwell to make any written record thereof. Consequently, it is perfectly understandable that when a witness like Huebner attempts to recount the some sixteen instances when he received substantial sums of money on behalf of Shotwell as over-ceiling payments on

Petitioners' motion for a new trial, and its denial, followed the filing of the suppression opinion. In their argument before the District Court defense counsel urged, among other things, that the court had "euphemistically" found Lubben's trial testimony to have been perjurious and, more broadly, that the second suppression hearing and trial versions of the disclosure episode differed so widely as to entitle petitioners to a new jury trial of the main case.[12] In denying the motion the district judge observed that he had simply said in his suppression opin-

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candy sold by that company, the amounts and circumstances as to the disposition of the money may not be too clear in his memory. However, the testimony he has given at the supplemental hearing is reasonably consistent and compatible with the testimony given by the government witnesses at the trial regarding these payments. Huebner did not take the stand at the first supplemental hearing nor during the trial; hence, his testimony as to the amounts of money received and the siphoning of these payments to various officials of the company in many instances discloses for the first time which individuals were the recipients of Lubben's payments. However, Huebner may be mistaken as to the exact amounts of money received and when the payments were made. Moreover, that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable. But the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lubben during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use. The question of good faith does not turn on the exact amount of Lubben money Huebner, Sullivan or Cain may have received for their own personal use. That Cain personally received substantial amounts of the Lubben black-market payments and that Sullivan knew of these payments and received a certain share for his personal use, but in a lesser amount than Cain and Huebner, is fully established by the record."

[12] In addition, petitioners' "Supplement To Motion For New Trial" alleged nine further grounds for a new trial, only one of which (the overruling of their challenge to the indicting grand jury array) is pressed here. *Infra*, pp. 361–364.

ion "that the amount that Lubben said he paid may have been exaggerated," and that he would grant a new trial if he thought there "was a miscarriage of justice," but that he did "not so find." A careful study of the record satisfies us that the District Court did not abuse its discretion in thus ruling.

Petitioners' argument on this score centers largely around the variances they claim to find between the testimony of Huebner (who had not testified in the earlier proceedings) at the second suppression hearing and Lubben's trial testimony as to the amount of Shotwell's black-market receipts. Huebner testified to some 16 or 17 occasions on which black-market money had been received from Lubben, all of which he said had been divided between himself, Cain and Sullivan. These payments aggregated $272,000 in 1945 and 1946, the years involved in the indictment, as compared with $454,000, Lubben's total trial figure.[13] But the indicated disparity of $182,000 is more apparent than real, for, apart from the fact that Huebner was not the only person in the Shotwell organization who had received Lubben money, and the fact that he was never asked to say whether these were

[13] Other more particular charges against the integrity of Lubben's trial testimony are also made: (1) that Huebner had contradicted Lubben with respect to a payment of $40,000 over-ceiling prices on certain chocolate-covered nuts (but the Huebner testimony to which petitioners refer is cloudy on this score); (2) that Huebner had testified that Lubben had "lied" with respect to a $49,000 payment to Graflund (but the record shows only that Huebner stated that he "thought it was a mistake on Lubben's part"); (3) that Huebner had testified on cross-examination that he "thought [Lubben] lied on the stand here" (but the record does not show in what respects Huebner thought this was so); and (4) that one Tobias, not called by either side at the suppression hearing, had altered Lubben's books, used in evidence at the trial (but the only basis for this assertion is Huebner's hearsay testimony that he had been present at the meeting where Tobias had so stated to Cain and Sullivan; moreover, this matter had already been testified to by Cain and Sullivan at the trial).

the only Lubben payments he himself had received, there must be added to this $272,000 total some $125,000 to $150,000 that the defense asserted had gone into a "corn box" (safe deposit box) and was actually used for the purchase of black-market supplies of corn.[14] Hence, viewing things most favorably to the petitioners, the variance of which they make so much is at best no more than from $32,000 to $57,000.[15]

We think the District Court was fully justified in finding that Huebner's testimony "at the supplemental hearing is reasonably consistent and compatible with the testimony given by the government witnesses at the trial regarding these [black-market] payments," and that it "tends to corroborate Lubben's testimony."[16] Such findings, made as they were in connection with what in effect was a motion for a new trial on newly discovered evidence, must "remain undisturbed except for most extraordinary

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[14] The record shows that the "corn box" records had been destroyed on Cain's instructions.

[15] Substantiation of the charges in the indictment did not of course depend on the precise amounts of Shotwell's black-market receipts, and the jury made no specific finding on that score, returning a general verdict.

[16] Huebner's testimony, given some 14 years after the events had occurred and without the use of any records, was quite general in regard to the amounts of the payments made by Lubben; the figures were always stated in round numbers, usually preceded by a qualifying adjective. For example, he testified that "sometime in January, 1945" he received "between ten and eleven thousand dollars" from Lubben, and that in the "first part of May of 1945" he received "approximately $30,000." In contrast, Lubben's trial testimony was precise as to the amounts paid and was supported by various documentary evidence—invoices, vouchers, book entries, recapitulation sheets, cash authorization sheets, and checks to cash. For example, Lubben testified that on May 3, 1945, he paid $22,124.13 to Huebner at the Sherman Hotel in Chicago; this testimony was supported by an expense voucher and a check to cash in that amount, both of which were put in evidence.

circumstances." *United States* v. *Johnson,* 327 U. S. 106, 111. We find none here. This is not a case, as were *Mesarosh* v. *United States,* 352 U. S. 1, and *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115, where a conviction may be regarded or is conceded to have rested on perjured testimony.[17] To overturn the denial of a new trial in this case by the two lower courts would be tantamount to saying that any subsequently discovered inaccuracy in the testimony of an important trial witness, which might have affected his credibility in the eyes of the jury, would entitle a convicted defendant to a new trial. We cannot so hold.

III.

Petitioners next argue that the remand proceedings were the product of fraud and other gross improprieties on the part of the Government and that they should therefore be held for naught. The contention has three aspects: (1) that the Government did not disclose to this Court that the testimony of three witnesses proffered in support of its motion to remand was contrary in some respects to that which they had given, or failed to give, on previous occasions; (2) that the Government failed to establish on remand that there had been any perjury on the part of the defense at the original suppression hearing, and itself suborned three of its remand witnesses to testify falsely; and (3) that the prosecution utilized the delay occasioned by the motion to remand (355 U. S., 236–237, note 6) to dragoon witnesses into testifying in support of

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[17] In stating this we have not been unmindful of the fact that subsequent litigation has shown Lubben's character not to be a savory one. See *Giglio* v. *United States,* 355 U. S. 339; *In re Carlsen,* 17 N. J. 338, 111 A. 2d 393; *State* v. *Weleck,* 34 N. J. Super. 267, 112 A. 2d 23. Yet, so far as this trial is concerned, a vigorous cross-examination of him, to the tune of some 300 pages of the printed record, evidently failed to shake his credibility in the estimation of the jury.

the Government's view of things.[18] We find no truth in any of these serious charges.

The most that could possibly be claimed respecting the absence of any reference in the remand papers to prior inconsistent statements by the proffered witnesses[19] is that it was a mistake of judgment on the part of the Government not to include such a reference. But, without minimizing the unqualified duty of scrupulous candor that rests upon government counsel in all dealings with this Court, to characterize this episode as amounting to a fraud upon the Court is, to say the least, utterly extravagant.

The issue tendered by the motion to remand was of course not whether the Government's new evidence was true or false, but whether it warranted a reexamination of the suppression issue by the District Court. The evaluation of this evidence, including the credibility of the three witnesses in question, was as this Court recognized (355 U. S., at 241, 244–245) a matter for the District Court.

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[18] At the oral argument petitioners' counsel of course disclaimed any intention of implicating the then Solicitor General, and we presume the members of his staff, in these accusations of wrongdoing.

[19] The witnesses were Graflund, Shotwell's comptroller, Huebner, and Lima, a former revenue agent. Specifically, the Government is accused of concealing the following contradictions: (1) Graflund had told government investigators and the 1956 grand jury (*infra*, pp. 360–361) that (as he had testified at the trial) he had first disclosed the black-market transactions to Busby, Shotwell's auditor, in January 1948, although his remand affidavit stated that this conversation had taken place in June 1948; (2) Huebner, prior to executing his affidavit, had not recalled having attended a meeting with Sullivan and one Urban at the Chicago Athletic Club for the purpose of discussing a purchase of Lubben's business so as to enable petitioners to get their hands on Lubben's books and records; (3) the Government's motion indicated that Lima would testify on remand that he had prepared a report showing a Shotwell deficiency of $20,000 and then destroyed it at his supervisor's direction, but it was not revealed that in his previous testimony at the trial Lima had not mentioned the preparation of such a report.

In these circumstances it is understandable that the Government might have considered that if a remand were ordered the District Court was the appropriate forum in which to make available any impeaching material in its possession. Cf., *e. g., Jencks* v. *United States,* 353 U. S. 657; *United States* v. *Zborowski,* 271 F. 2d 661. In any event the Government having fully disclosed all such material in the trial court, and that court having taken it into account in making its findings, *infra,* p. 360, it would be captious to hold that the failure to advert to it in this Court now vitiates the remand.

The claim that the remand should be set aside because no perjury was found in connection with the petitioners' original testimony relating to the disclosure both misconceives the terms of the remand and misportrays the record. Our remand did not have the narrow compass attributed to it, but broadly directed the District Court to reexamine the whole disclosure episode (355 U. S., at 245–246)—a direction to which the proceedings below were entirely responsive. And the District Court plainly found that the course and nature of the disclosure had been deliberately misrepresented by petitioners in significant respects at the earlier suppression hearing.[20] On the other

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[20] In essence the defense position at the first suppression hearing had been (1) that a general disclosure had first been made to Sauber, the Bureau's representative, by Busby and Cain in late January 1948, some six months before the Bureau's Agent Krane had commenced an investigation of the Lubben-Shotwell transactions on June 21, 1948; (2) that pursuant to the January discussion with Sauber the disclosure figures had then been prepared over a period of several months and furnished to the Bureau in August 1948; and (3) that none of the Shotwell black-market receipts had been pocketed by any of the individual petitioners.

At the second suppression hearing the District Court found (1) that the Busby and Cain general disclosure had not been made in January 1948, but "much later" than March 15, 1948, the date testified to by Sauber in the earlier proceedings, although it was before the opening

side of the coin the District Court, after full and painstaking consideration, found that the facts, except in one particular, were as anticipatorily represented in the Government's remand papers, and that Huebner, Graflund and Lima (note 19) had testified honestly.[21] It is certainly not for us to reassess their credibility.

Finally, as to the Government's alleged dragooning of these witnesses, it appears that in connection with a new grand jury investigation that was conducted from April 1956 to February 1957 into these same black-market transactions (resulting in a further indictment against these individual petitioners and others), Graflund, Huebner, and Lima, among some 64 witnesses, were called for question-

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of Krane's investigation on June 21, 1948; (2) that while efforts were made between January and August 1948 to get from Lubben the amounts of Shotwell's black-market receipts, the offsetting black-market supply payments were not made up until a day in July 1948 and were then "concocted 'out of thin air,'" as had been represented in the Government's motion to remand; and (3) that petitioners' denials of having personally pocketed any of the black-market receipts were false.

[21] The District Court found it "very probable" that Graflund had first talked with Busby about Shotwell's black-market receipts in January 1948, contrary to his remand affidavit (note 19, *supra*) and testimony at the second suppression hearing where he fixed the date as late June 1948. The court, however, found that Graflund had given the latter date "in good faith," and that his error was attributable to "lapse of time" and the probability that there had been such conversations in both January and June, Graflund having been led to discard the January date because of the "apparent falsity of Busby's statement that he first spoke to Sauber in January, 1948." The court further observed: "I believe Graflund is attempting now to tell the truth as he remembers the events after the lapse of these many years."

The court also believed Lima's testimony as described in the Government's motion to remand (note 19, *supra*), although it doubted whether the destroyed report was intended to represent the final disposition of the Shotwell affair. And as to Huebner, see pp. 355–356, *supra*.

ing on more than one occasion. But there is nothing in this record to indicate that these repetitive appearances were oppressive or that any of their questioning was attended by improper methods of interrogation.[22] And the District Court, after elaborate exploration, found the charges of prosecutorial overreaching baseless.[23]

We now leave the remand proceedings and turn to the only two challenges pressed here with respect to the main case itself.

IV.

In March 1958, more than four years after the trial, petitioners filed amended motions attacking the grand and petit jury arrays. These motions, predicated on "newly discovered evidence," alleged that both juries were illegally constituted because the jury commissioner delegated his selection duties to one of his private employees; volunteers were permitted to serve on the juries; and the

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[22] Both Huebner and Graflund testified under cross-examination by petitioners' counsel that they had not been subjected to pressure of any kind.

[23] The court said: "Defendants urge that Huebner and Graflund, concerned with possible future criminal prosecution against them by the Government, and Lima, worried about his job, have wittingly or unwittingly followed the suggestions and pattern of events which zealous government officials may have attempted to inculcate. I have endeavored to make reasonable allowances for the lapse of the years which dim memories, and to give due consideration to the claim of the defendants as to the interest of the revenue officers, and perhaps others, to encourage these witnesses to follow a chronology of events and circumstances which may support the Government's contentions as to what occurred during the years in question. However, I do not believe that any government official has attempted to have any witness herein testify falsely." And the court further observed: "The forthright attitude of government counsel to submit all prior statements and Grand Jury testimony of Huebner and Graflund to defendants' counsel indicates a commendable frankness in affording the Court all of the background which may bear upon their veracity."

Clerk of the District Court failed to employ a selection method designed to secure a cross-section of the population.

We think, as the two lower courts did, that petitioners have lost these objections by years of inaction. Rule 12 (b)(2) of the Federal Rules of Criminal Procedure provides: "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." Petitioners concede, as they must, that this Rule applies to their objection to the grand jury array,[24] but deny that it applies to their objection to the petit jury array. On the latter point we do not agree. In *Frazier* v. *United States,* 335 U. S. 497, 503, this Court stated that a chalienge to the method of selecting the petit jury panel comes too late when not made before trial. And the lower federal courts have uniformly held that an objection to the petit jury array is not timely if it is first raised after verdict. See, *e. g., Hanratty* v. *United States,* 218 F. 2d 358, 359, cert. denied, 349 U. S. 928; *United States* v. *Klock,* 210 F. 2d 217, 220; *Higgins* v. *United States,* 160 F. 2d 222, 223, cert. denied, 331 U. S. 822; *United States* v. *Peterson,* 24 F. Supp. 470.

Petitioners have not advanced any reasons for overturning this settled course of decision. Rather, they argue that when public officials violate constitutional rights by actions whose illegality is not readily noticeable

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[24] See *Scales* v. *United States,* 367 U. S. 203, 259; *United States* v. *Clancy,* 276 F. 2d 617, 631, rev'd on other grounds, 365 U. S. 312; *Miranda* v. *United States,* 255 F. 2d 9, 16.

by the litigants or their counsel, sufficient cause has been shown to warrant relief from application of the Rule. *Ballard* v. *United States,* 329 U. S. 187, is said to stand for the broad proposition that technical rules of procedure do not prevent this Court from considering the merits of a basic challenge to the method of jury selection.

In the circumstances of this case, petitioners' contentions are without foundation. In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. Indeed, the acceptance of volunteers for the juries had received publicity in the newspapers, and their presence on the petit jury could have been ascertained at the time it was constituted. And *Ballard* lends no support to petitioners' position, for in that case the challenge to the jury panel had been timely made and preserved. See 329 U. S., at 190.

Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice.[25] In *Ballard* it was said (at p. 195) that "reversible error does not depend on a showing of prejudice in an individual case." However, where, as here, objection to the jury selection has not been timely raised under Rule 12 (b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule.

[25] It is not suggested that the contentions made here go to the individual qualifications of any seated grand or petit juror.

We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost.

V.

Petitioner Sullivan contends that he was denied a fair trial in two respects: (1) the only specific evidence against him was an alleged admission which Lubben testified Sullivan made to him—testimony which Lubben, it is asserted, later recanted; and (2) the trial judge's instructions allowed the jury to consider evidence that had not been admitted against him.

At one point in the trial Lubben testified that, to the best of his recollection, he had a conversation with Sullivan on or about February 14, 1946, concerning the advisability of paying the black-market overages by check. According to Lubben: Sullivan asked "Are you sure this [the payment] is not appearing on your books any place?" Sullivan then proceeded to state: "Well, Dave, you know how it is. You have a place in New Jersey, a farm in New Jersey. This money I have been using in my farm. . . . I am getting a new driveway . . . put in. . . . That is the only way I can do it today, with the tax situations the way they are." When the trial resumed the following day, Lubben volunteered a correction of his previous testimony, stating that the conversation had taken place as described but not on February 14, 1946; it had occurred, he thought, "some time around September or October of 1946." It is apparent, therefore, that the substance of the testimony was not recanted.

There was, moreover, additional testimony against this petitioner. Sullivan himself admitted at the trial that he had knowledge of the Shotwell black-market receipts, maintaining, however, that the money was used solely for the purchase of black-market supplies. But Roeser,

comptroller of Shotwell, testified that, when directed, he turned over cash moneys received from Lubben to Cain, Huebner, and Sullivan. Ericson, shipping superintendent of Shotwell in 1945 and 1946, stated that although his memory was not clear as to the particular officials present when the devious method of shipping black-market candy to Lubben was inaugurated,[26] he would not have shipped in this way without instructions from Cain, Sullivan, or Huebner. And Sullivan's own answers on cross-examination respecting his knowledge of the necessity for keeping the Lubben black-market transactions off Shotwell's books were, to say the least, highly equivocal.[27]

The foregoing evidence, coupled with Sullivan's status as executive vice-president of Shotwell and his general prominence at the policy level of the company's affairs, was amply sufficient to carry the case as to him to the jury and to support its verdict of guilt.

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[26] When shipping candy to Lubben, the name "ABC Company" was entered on the bills of lading as the shipper instead of Shotwell.

[27] "Q. Didn't you know it [Lubben payments] would have to be kept off the books or the OPA investigators would locate it?

"A. That was true after—that wasn't true after June of 1945 when the OPA went off, or am I right—1946, June 30th.

"Q. How about the period prior to that?

"A. Certainly it had to be kept off the books or you would be subject to perhaps additional trouble. I know that now. I didn't know it then, I don't believe.

"Q. Well, are you sure?

"A. Am I sure about what?

"Q. You said you don't believe you knew it then. Are you sure you didn't know it then?

"A. I don't ever remember discussing it. I am not positive.

"Q. Of course you knew that if it was off the books for OPA purposes, it was also off the books for Internal Revenue purposes, didn't you?

"A. Not necessarily. Not necessarily."

The trial judge repeatedly cautioned the jury throughout the trial that certain evidence, particularly the disclosure documents turned over to the Treasury, was not being admitted against Sullivan and should not be considered against him. It is claimed, however, that the court's instructions nevertheless allowed the jury to consider such evidence. The allegedly erroneous portion of the charge states:

> "You have heard the testimony regarding Cain's alleged admission as to the falsity or incompleteness of these tax returns, and his explanation as to why, in his opinion, at the time he assumed they were false and inaccurate.
>
> "There has also been received in evidence work sheets and data compiled by Mr. Busby, and certain data compiled by Mr. Cain with respect to an alleged tentative compilation of the overages, and the disposition of such receipts by Shotwell, for raw materials, and the nature and character of the disposition, which was allegedly made.
>
> "All of the testimony should be considered by you, that is, all that testimony should be considered by you in view of the circumstances, and understanding of the parties in so far as it may bear upon any intent of the parties to wilfully violate the income tax laws or their good faith, or lack of good faith in the matter."

This instruction must be read in context. Shortly after it was given, the court proceeded to charge:

> "Any statement or act of any of the defendants not in the presence of another defendant is not binding upon the absent defendants, even though one or more of the defendants were mentioned in the conversation, nor are such matters competent evidence against any other defendant not present. I have

> limited, you will observe, certain evidence during the trial, from time to time, as being competent only as to certain defendant or defendants, that is, by way of example, what Mr. Huebner, or Mr. Cain may have said or done in the absence of Mr. Sullivan, would not be binding or competent as to Mr. Sullivan."

This limiting instruction is clear. It must be presumed that the jury conscientiously observed it. *United States* v. *Harris,* 211 F. 2d 656, 659, cert. denied, 348 U. S. 822. Surely it would have been impracticable for the trial judge, as he discussed the evidence in his final instructions, to have reminded the jury with respect to each of the many items of proof mentioned that it had been admitted only against certain named defendants and should not be considered against the others. We find no error in the charge.

The judgment of the Court of Appeals as to all petitioners must be

Affirmed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

I think these criminal convictions should be reversed and a new trial granted because of serious errors denying the defendants the protection of two constitutional guarantees for a fair trial.

First. The jury verdicts rest in part on confessions obtained from the defendants by governmental promises of immunity from criminal prosecution, in violation of the Fifth Amendment.

Second. If the Government's chief witness on the remand hearing gave truthful testimony, the jury's conviction of the defendants rests in substantial part on false testimony of the Government's chief trial witness.

An understanding of these two questions requires a statement of the circumstances out of which they arise. The Shotwell Manufacturing Company and its principal officers were convicted in Federal District Court of willfully attempting to evade Shotwell's corporate income taxes for the years 1945 and 1946. The most damaging evidence the Government had against the defendants consisted of confessions of the individual defendants that they had failed to report certain amounts of the corporation's 1945–1946 income. The Government also offered data it obtained from the books and records of the corporate defendant after these confessions were made. At the time these confessions were given, the Treasury Department had in effect its widely publicized and proclaimed "voluntary disclosure policy," which, according to Secretary of the Treasury Vinson, promised immunity from prosecution to any tax evader, even a "willful evader," "who makes a disclosure before an investigation is under way." [1] This whole record shows beyond doubt that before any investigation of them had been initiated the defendants learned of the Treasury's promise and disclosed their failure to report income

[1] Hearings on Proposals for Strengthening Tax Administration before a Subcommittee of the House Committee on Ways and Means, 82d Cong., 2d Sess. 143–144 (1952) (statement of Secretary Vinson, reprinted from Washington Post, Aug. 21, 1945). Some form of voluntary disclosure policy had existed since 1919. In 1945, however, the policy took the form of a clear and direct invitation to taxpayers to come forward and disclose their tax derelictions in reliance on the Government's unequivocal promise of immunity. Hearings, *supra*, at 78–79 (Press Release of Treasury Department, Dec. 11, 1951). Secretary Vinson's statement "crystallized" the earlier practice into "definite policy," according to Turner L. Smith, Chief of Criminal Tax Section, Dept. of Justice, in an address reprinted in Section of Taxation, ABA, Symposium on Procedure in Tax Fraud Cases 29, 38–39 (1951).

with the full expectation of receiving the benefits of the promise. Moreover, they made their confessions and made the data available only after assurances of a Chief Deputy Collector that "if the disclosure [was] timely and the facts . . . related to him were correct, he saw no reason why the immunity policy of the Bureau should not be applied in this particular matter." After the defendants, solely in reliance on the policy, had voluntarily given government agents enough evidence to show a failure to report a substantial part of Shotwell's 1945–1946 income, the Government nevertheless refused the promised immunity and secured the indictments on which these prosecutions are based. Charging that the court should not permit the Government to reap advantage from broken promises but should compel it to grant the promised immunity, the defendants filed motions to dismiss the indictments. The court refused to dismiss, however, holding that since the Treasury Department's promises of immunity were not authorized by statute, the Government was not legally bound to keep these promises and could therefore break faith with its taxpayers whenever it chose to do so. Having been denied the promised immunity, the defendants then moved to suppress their confessions, the incriminating documentary evidence which they had specially prepared and delivered to Treasury agents, and all data compiled by the Treasury from books and records made available by the defendants during the time the Government was leading them to believe that they would be granted the immunity as promised. The ground for the motion to suppress was that since the confessions had been obtained by promises of immunity their use would violate the Fifth Amendment's prohibition against compelling a person to be a witness against himself. The District Court refused to suppress, but the Court of Appeals

reversed the convictions because they were based partly on the confessions and documents.[2] While the Government's application for certiorari was pending before us, the Government filed motions asking us to delay consideration of its application. The Government alleged that, since the convictions, it had obtained evidence indicating that the defendants and a government official had given perjured testimony about the timeliness and complete truthfulness of the disclosures. Later, we were asked to remand the whole case to the district judge for him to give new consideration to the motion to suppress, the grounds for this motion being that the Government had new evidence in the form of affidavits tending to show that the defendants' disclosure of their tax derelictions had neither been "timely" nor "in good faith." The Government claimed to have affidavits showing (1) the disclosures were not "timely" because they had not been made until after an investigation had been initiated by the Government and (2) the disclosures were not "in good faith" because the defendants had denied their guilt of criminal tax evasion. This Court granted the motion and remanded the case [3] over a dissent which in part took the position that the alleged new facts bore directly on the guilt or innocence of the defendants and that the defendants were entitled to have this evidence submitted to a jury instead of to a trial judge. On remand the evidence offered by the Government before the trial judge utterly failed to support the Government's charge that the defendants were guilty of perjury in testifying that their disclosures to the Treasury Department were made before any investigation had been initiated. As to the second charge that the defendants did not act in good faith

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[2] *United States* v. *Shotwell Mfg. Co.*, 225 F. 2d 394 (C. A. 7th Cir. 1955).

[3] 355 U. S. 233 (1957).

because they denied their guilt, the trial judge found with the Government. It is of great importance, however, that the chief government witness on remand (Huebner) testified that the chief government witness at the trial before the jury (Lubben) had lied to the jury in giving evidence which the record shows was crucial to the jury's finding of guilt. Although the district judge was compelled to find from the record that it was "entirely probable" that this government witness Lubben had "exaggerated" in giving testimony before the jury, he nevertheless reaffirmed his refusal to suppress the incriminating evidence and also denied a motion for a new trial because he thought the defendants were guilty anyway and there would therefore be no "miscarriage of justice" in denying them a new trial before a new jury to hear the new evidence. This time the Court of Appeals affirmed.[4] It is out of this situation that the two issues arise, the rights protected by the Fifth Amendment, and the right to a fair trial before a jury.

I.

I think the Court of Appeals was wrong in affirming the refusal to suppress but was right the first time when it held that the use of these confessions induced by the Government's promise of immunity "was a violation of each defendant's privilege against being compelled in any criminal case to be a witness against himself, as guaranteed by the Fifth Amendment to the constitution of the United States." [5]

"The constitutional test for admission of an accused's confession in federal courts for a long time has been whether it was made 'freely, voluntarily and without compulsion or inducement of any sort.' " [6] Confessions

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[4] 287 F. 2d 667 (C. A. 7th Cir. 1961).

[5] 225 F. 2d 394, 406 (C. A. 7th Cir. 1955).

[6] *United States* v. *Carignan*, 342 U. S. 36, 41 (1951).

of guilt "are inadmissible if made under any threat, promise, or encouragement of any hope or favor." [7] This Court's leading discussion of the admissibility of confessions, admissions, and incriminating statements both at common law and under the Fifth Amendment is contained in *Bram* v. *United States,* 168 U. S. 532 (1897). That opinion written by Mr. Justice White traces the development of the prohibitions against the use of involuntary confessions both in England and in this country. It concludes that in United States courts,

> "the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " 168 U. S., at 542.

To explain what confessions are admissible under the Fifth Amendment because not "compelled," the Court quoted and adopted this passage from 3 Russell on Crimes 478 (6th ed.):

> " 'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' " 168 U. S., at 542–543. See, to the same effect, *Wilson* v. *United States,* 162 U. S. 613, 622 (1896).

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[7] *Wilson* v. *United States,* 162 U. S. 613, 622 (1896).

Thus it was clearly pointed out that a "compelled" confession within the Fifth Amendment's meaning is one induced either by fear of injury or hope of reward. In order to emphasize this conclusion, the Court in *Bram*, time after time, repeated for itself or quoted with approval prior statements that confessions to be "free and voluntary" must not have been induced or influenced by "hope or fear," [8] "compulsion . . . physical or moral," [9] "threat or inducement," [10] or by "any inducement." [11] A careful reading of the *Bram* opinion can leave no doubt that a proper interpretation of the Fifth Amendment, according to that case, would prohibit the Government's use of a confession induced by a hope of immunity such as that solemnly held out by the Government here just as much as it would bar use of a confession obtained by violence or threats of violence. And no one of these statements, which the Court professes today to accept, leaves this Court with the slightest freedom to invent exceptions to the Fifth Amendment rule that confessions so induced are inadmissible. Not only has the *Bram* case been repeatedly cited with approval by this Court [12] but also

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[8] 168 U. S., at 548, 549, 550, 558, 562.

[9] *Id.*, at 548.

[10] *Id.*, at 554.

[11] *Id.*, at 556.

[12] See, *e. g.*, *Hardy* v. *United States*, 186 U. S. 224, 229 (1902); *Wan* v. *United States*, 266 U. S. 1, 15 (1924); *Lisenba* v. *California*, 314 U. S. 219, 236 n. 16 (1941); *Waley* v. *Johnston*, 316 U. S. 101, 104 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154 n. 9 (1944); *Smith* v. *United States*, 348 U. S. 147, 150 (1954); *Gallegos* v. *Colorado*, 370 U. S. 49, 52 (1962). But see *Stein* v. *New York*, 346 U. S. 156, 190 n. 35 (1953). The general validity of *Bram* has been assumed in many other cases. See *Mapp* v. *Ohio*, 367 U. S. 643, 656–657 (1961), where the Court quoted *Bram* in stating, "We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and

its declaration that confessions are equally involuntary whether obtained by hope or fear is in harmony with the rule that has obtained in a majority of the state courts for more than a century.[13] Indeed, it is a commonplace, known perhaps to any lawyer who has ever tried half a dozen criminal cases, that before offering a confession against a defendant a proper predicate must be laid, that is, proof that the confession was not the result of any threat or promise of reward.[14]

The continuing vitality of the Fifth Amendment's protection as defined in *Bram* was specifically recognized in *Smith* v. *United States,* 348 U. S. 147 (1954), which involved circumstances startlingly like those in this case. Smith was prosecuted for attempted tax evasion. He contended that a confession of his should not have been admitted into evidence because he gave it on an understanding with a government agent that he would be granted immunity. Smith's accountant testified that the agent had promised this immunity and that the data showing guilt would not have been given had these governmental promises not been made. The trial judge submitted this issue to the jury with the instruction that it should reject the confession if "trickery, fraud or deceit" had been "practiced on petitioner or his accountant." This Court held that on those facts the issue was properly submitted to the jury and that "the jury, in arriving at its general verdict [of guilt], could have found from the conflicting evidence

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the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle.' "

[13] See 28 L. Ed. 262, note. Cases collected, 20 Am. Jur., Evid., §§ 506, 511; 18 L. R. A. (N. S.) 820–824; 50 L. R. A. (N. S.) 1086–1087.

[14] It is interesting to note that in the proceedings on remand, government counsel, in calling the witness Huebner who testified as to matters that incriminated him, was eager to have Huebner state that no one connected with the Federal Government had threatened or coerced him or made him "any promises of reward or immunity."

that no fraudulent inducement had been offered petitioner or his accountant." 348 U. S., at 151. In the present case, the undisputed evidence given both by the Government's tax agent himself and by defendants' accountant was that the agent had assured the defendants that the Government's general policy of immunity would be applicable to them. The Circuit Court found as a fact that this promise was made by the government agent.[15] On remand, the District Court found it "entirely probable" that the promise had been made. The Court of Appeals in its second opinion did not disturb its earlier findings, and indeed no one, not even the Government or this Court, appears to challenge these findings. Thus, the facts proved in this case would, had they been present in the *Smith* case, have resulted in the exclusion of Smith's incriminating statement as "trickery, fraud or deceit." [16]

Although the Court purports to accept the *Bram* holding that the Fifth Amendment of itself forbids the use of a defendant's confession "obtained by any direct or implied promises, however slight," its opinion most decidedly rejects this interpretation of the Amendment. The rejection lies mainly in the Court's attempt to prove what I deem to be the unprovable, namely, that although these confessions "might not have been made in the absence of the Treasury's offer" of immunity, they nevertheless were not induced or influenced by that offer. In order to reach its astonishing conclusion, the Court uses various alternative formulas, each of which in turn lops off a significant part of the protections the Fifth Amendment has always been thought to afford.

The Court says that because the Secretary of the Treasury addressed his promise of immunity "to the public generally and not to particular individuals" the

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[15] 225 F. 2d, at 400.

[16] Cf. *Smith* v. *O'Grady*, 312 U. S. 329 (1941).

Fifth Amendment leaves the Government wholly free to use all confessions induced by this general device. Certainly this excuse for denying the protection of the Fifth Amendment cannot be inferred either from the language of the Amendment or from anything said in the *Bram* case. It is impossible for me to understand why a confession obtained by promises addressed to the public generally is any more "voluntary" than one obtained by promises addressed to identified taxpayers known or suspected to be delinquent. Indeed, a general promise of immunity announced by a member of the President's Cabinet is likely to be far more authoritative and compelling than is an isolated promise by a subordinate official. Surely the Government cannot escape the command of the Fifth Amendment not to use government-induced confessions simply by multiplying the number of people who are promised immunity. Moreover, even if specific statements to individuals are required, the confessions in this case would still be barred by the Fifth Amendment. This is because, as has been pointed out, a Chief Deputy Collector for the Government assured the defendants' accountant that he saw no reason why their disclosures should not entitle them to immunity under the general policy.

The Court also seems to state that the Fifth Amendment does not bar the admission of confessions induced by promises of immunity unless given while under suspicion of crime in response to a specific promise by a particular officer like a policeman. There is no support for this in the *Bram* case. The Court in that case, in stating that a confession induced by a promise, however slight, was involuntary and therefore inadmissible under the Fifth Amendment, in no way intimated that the fact of involuntariness depends upon the presence of a policeman or upon any circumstance other than that a promise has been made which induced a confession. It seems to me

that a taxpayer, uneasy about possible criminal prosecution and worried about its destructive effect on his family, reputation, and business, would be susceptible to an official promise of immunity just as any other person fearful of prosecution for some other offense.[17] And if independent coercive circumstances—like the presence of a policeman, with or without club—are necessary to bar the use of a confession, as the Court indicates, then the Court is denying that a promise by itself, no matter how authoritative, can ever result in a compelled confession prohibited by the Fifth Amendment.

The Court concludes that "the voluntary disclosure policy left [petitioners] wholly free to disclose or not as they pleased. In choosing to act as they did, petitioners, far from being the victims of that policy, were volunteers for its benefits." Labeling petitioners as "volunteers" proves nothing. Of course they were "volunteers." It was to get "volunteers" that the Government established the policy. Petitioners learned that their Government had promised immunity for disclosures and they volunteered to make them because of that promise. But petitioners' confessions are no more "voluntary"—in the sense of not being induced by a promise—than those of suspects who choose to accept the benefits of a policeman's promise of immunity rather than to run the risk of being convicted on independently secured evidence. The Court's interpretation of the Fifth Amendment as permitting the use of confessions obtained by promises because those who relied on the promises were "volunteers" effectively scuttles the protection of that Amendment.

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[17] According to the Chief Deputy Collector's testimony, one of the defendants in this case was particularly worried about the publicity that would attend a criminal case because he had two boys in school. It was at this point that the Collector assured him that this was a civil case and "he had nothing to worry about so far as publicity was concerned."

While the Court uses language which purports to give the same full scope that *Bram* did to "jealously guarded constitutional principles" of the Fifth Amendment, it is with regret that I am compelled to say that I think the Court promises more than it performs. The Court treats the cases of *Rogers* v. *Richmond,* 365 U. S. 534 (1961), and *Bram* v. *United States, supra,* as if both were rested on the Fifth Amendment. *Rogers,* however, related to a confession used in a state court, the admissibility of which depended on the Due Process Clause of the Fourteenth Amendment. While some of us believe that the Due Process Clause made the Fifth Amendment applicable to the States, *Rogers* was obviously written on the premise that the Due Process Clause forbids the use of confessions only if the circumstances under which they are used are so offensive or unreasonable as to "shock the conscience" or offend "civilized standards of decency." [18] *Bram,* on the other hand, rested exclusively on an interpretation of the Fifth Amendment's specific language forbidding the Government to compel a defendant to be a witness against himself. This distinction is important because the more precise words of the Fifth Amendment as construed in *Bram* are a far more certain safeguard against the use of compelled confessions than the tractable and pliable protections which the Court may or may not afford under the due process "shock the conscience" test. The Fifth Amendment, as construed in *Bram* and as recognized in *Smith* v. *United States, supra,* forbids the use of confessions obtained by governmental promises of immunity on the theory that such promises alone render

[18] Cf. *Reid* v. *Covert,* 354 U. S. 1, 41, 44, 65, 77 (1957) (concurring opinions); *Rochin* v. *California,* 342 U. S. 165, 169 (1952); *Adamson* v. *California,* 332 U. S. 46, 59, 67–68 (1947) (concurring opinion). But cf. *Mapp* v. *Ohio,* 367 U. S. 643, 661, 666 (1961) (concurring opinion); *Kinsella* v. *United States ex rel. Singleton,* 361 U. S. 234, 246–247 (1960).

confessions involuntary without requiring the presence of any other coercive circumstances.[19] Moreover, if the admissibility of the confession is to be measured by standards of decency it is difficult to reconcile with those standards a holding that the Constitution forbids the Government to use a confession induced by the promise of a police officer or other subordinate agent but that it is wholly permissible to use a confession induced by the Secretary of the Treasury, one of the highest-ranking men in the Government. I cannot deny that such a standard for governmental conduct shocks my conscience. This is particularly true when I consider the nature of the assurances solemnly given to delinquent taxpayers by Secretary of the Treasury Fred M. Vinson, who later became Chief Justice of the United States. He said that the

> "man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a collector or other revenue officer and simply saying, 'There is something wrong with my return and I want to straighten it out.' " [20]

This simple description of all the taxpayer had to do to save himself and his family from the stigma of a prosecution is no longer recognizable in the *ex post facto* quagmire of complicated restrictions and conditions created by the Court today.

Another theory of the Court, which also departs from the *Bram* case, seems to be that there was a constructive withdrawal of the promised immunity because of the

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[19] Similarly there can be no question of "balancing" Fifth Amendment rights against any kind of "competing interests." See Frantz, "The First Amendment in the Balance," 71 Yale L. J. 1424, 1436–1437 (1962).

[20] Hearings, *supra* note 1, at 144.

Court's findings that the defendants failed to comply with the promise's condition of complete truthfulness. With this legal fiction as a premise, the Court moves inexorably to the conclusion that the confessions were not induced by any promise to the defendants. Nothing that I can find in the record after a careful reading furnishes a basis for the most attenuated inference that these defendants would have come forward and disclosed any tax derelictions had the Government not announced its voluntary disclosure policy and made it clear that these particular defendants could expect its benefits. The Court is here departing from the proper test as laid down in *Bram* for determining whether a disclosure is induced by a governmental promise. It was there said that a person is "involuntarily impelled to make a statement, when but for the improper influences he would have remained silent." 168 U. S., at 549. But for the immunity promised to the defendants in this case, it is inconceivable that they would have volunteered evidence upon which they could be tried and perhaps convicted of tax evasion. Moreover, every promise held out by the Government is intended to be conditioned on full and truthful disclosure. The majority's rule would require that any confession obtained by a governmental promise be admitted if it contains something less than the whole truth.

What the Court is in fact holding here is that the defendants should be denied their right to have their confessions excluded because while the confessions were in part truthful they were not truthful as a whole.[21] This Court has held under the Due Process Clause of the Four-

[21] Nowhere is this made more clear than in the Government's argument in its brief, in effect adopted by the Court, that "it is inconceivable . . . that the rule barring the use of involuntary confessions should operate to exclude a declaration in which damaging admissions are inextricably intertwined with false self-serving exculpatory statements . . . ." Brief for the United States, p. 42.

teenth Amendment that a confession's truth or falsity is not relevant to the question of its admissibility.[22] I do not believe the Court should adopt a new Fifth Amendment shrinking device under which a defendant's lack of "good faith" and failure to be 100% truthful in his induced confession works a forfeiture of his Fifth Amendment rights. Probably few confessions in criminal cases are ever wholly truthful. Even a cursory examination of such cases in this and other countries would show that defendants who confess nearly always lay all the blame possible on someone else or in some way seek to justify their conduct in whole or in part.[23] Certainly this Court could not, consistently with its prior cases, hold admissible a confession obtained by a promise or threat from a person who confessed that he had assaulted another but falsely and fraudulently claimed that he had done so in self-defense. Nor could it admit the confession of a person suspected of receiving stolen goods who, after beatings, admitted possession of the goods but falsely claimed he did not know they were stolen. Yet, by the majority's view here, such compelled confessions will be admissible because, being partly false, they are "fraudulent," not made in "good faith." This is the first time, to my knowl-

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[22] *Rogers* v. *Richmond*, 365 U. S. 534, 543–545 (1961). See *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960); *Spano* v. *New York*, 360 U. S. 315, 324 (1959); *Payne* v. *Arkansas*, 356 U. S. 560, 567–568 (1958); cf. *Lee* v. *Mississippi*, 332 U. S. 742, 745–746 (1948); *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152 n. 7 (1944); *White* v. *Texas*, 310 U. S. 530, 531–532 (1940). While these cases were state cases decided under the Fourteenth Amendment, the Fifth Amendment's specific prohibition against the use of compelled testimony should certainly be no less comprehensive than the bar against a State's use of such testimony under the Fourteenth.

Compare *Mapp* v. *Ohio*, 367 U. S. 643, 656 (1961) (search and seizure).

[23] See, for example, the confession in *Reck* v. *Pate*, 367 U. S. 433, 438 (1961).

edge, that a defendant's constitutional right not to be compelled to be a witness against himself has ever been conditioned on his failure to come into court with "clean hands." I cannot agree to this new doctrine that a compelled confession can be admitted because partly untruthful. Such a step backwards is particularly dangerous because of the ease with which this case can be extended to admit confessions obtained not by physical violence or threats of violence but by more "civilized" techniques of compulsion, which we have characterized as inherently coercive [24]—techniques of physical exhaustion, psychological pressure, trickery, promises of leniency, and the like which sometimes subtly but always certainly undermine an accused's freedom to confess or not, as he chooses.[25]

To my way of thinking, it is the Court itself, instead of the defendants, which turns "an important constitutional principle upside down." It does this by permitting the Government to prove its case with confessions obtained by solemn promises of immunity on the theory that the confessions were not given in "good faith" and were therefore fraudulent. This conclusion is based on a finding that, while the defendants confessed a failure to report income, they falsely stated at the same time that their receipts were offset by business expenditures. In short, the Court believes that the defendants are guilty of the tax evasion charged and therefore have forfeited their Fifth Amendment rights. I cannot agree that the Court is right in making the admissibility of the confessions turn on the guilt or innocence of the defendants. The denial of the benefits of the Fifth Amendment on the Court's

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[24] See *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154 (1944).

[25] See, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Haley* v. *Ohio*, 332 U. S. 596 (1948); *Leyra* v. *Denno*, 347 U. S. 556 (1954); *Fikes* v. *Alabama*, 352 U. S. 191 (1957); *Spano* v. *New York*, 360 U. S. 315 (1959); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); *Gallegos* v. *Colorado*, 370 U. S. 49 (1962).

belief that the defendants are guilty is a high price to pay for a conviction and a new, dangerous inroad on the protections of that Amendment. But if this is to be the standard, then I can see no escape from the conclusion that the admissibility of the confessions should ultimately be determined by a jury—not by the judges of this or any other court.[26] Moreover, if it be assumed that the Court is correct in concluding that these defendants have been guilty of fraud or perjury in their confessions, then under normal ideas of due process the proper procedure would be to indict them on these charges and let them be tried. But this Court should not use its judgment of the defendants' guilt of any crimes as an excuse for depriving them of the constitutional guarantees of the Bill of Rights.

Whatever the Court's reasons for affirming this judgment, it is plain that *Smith* v. *United States, supra,* has been undermined, the *Bram* case has been practically repudiated, and, worse still, the Fifth Amendment's prohibition against involuntary confessions has become far less of a constitutional protection than it ever was before. There is no basis in the Amendment itself for reducing its scope as the Court does today, and no precedent, weak or strong, old or new, can be found to support it. It is this Court's own invention. This Court alone therefore, this 14th day of January 1963, is entitled to whatever credit is due for enfeebling our Bill of Rights in this way. It earns that credit by ignoring the wise and solemn warning given in *Boyd* v. *United States,* 116 U. S. 616, 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and uncon-

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[26] I have previously expressed the view, to which I adhere, that the admissibility of all confessions should be a jury question. *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233, 246, 248–250 (1957) (dissenting opinion).

> stitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

To construe the Fifth Amendment's prohibition against the use of compelled testimony as not protecting these confessions induced by promises of immunity is certainly no liberal construction of that part of our Bill of Rights. I cannot agree to this holding because I still believe that constitutional provisions designed to protect individual liberty from oppressive procedural tactics by government should be liberally construed in order to prevent their erosion and obliteration by insidious Legislative, Executive, and Judicial encroachments.[27] The Court's holding today will probably give great aid and comfort to many earnest people who sincerely believe that this provision of the Fifth Amendment against the use of government-induced confessions is an unworthy barnacle on the law, a sixteenth century strait jacket, which should be removed as an outworn technicality of a bygone age. Even if this is a sound view, which I do not believe, it should not be put into effect by judicial decisions like this gradually narrowing the protective scope of that Amend-

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[27] See *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Gouled* v. *United States*, 255 U. S. 298, 303–304 (1921); *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892).

ment but only by the constitutionally ordained amending process so that the people of this Nation can determine for themselves whether they wish to abandon this part of their heritage of freedom.

II.

Since the record now contains new testimony offered by the Government on remand which thoroughly discredits the Government's main trial witness upon whose testimony the jury's verdict of guilty in large part rested, the defendants are being denied their constitutional right to a fair jury trial by the failure to grant them a new trial before a new jury which can hear this new evidence in determining their guilt or innocence.

This extraordinary situation arises out of the following circumstances:

Shotwell Manufacturing Company was in the candy business. During the O. P. A. days it sold candy at over-the-ceiling prices to companies wholly or in part operated by one Lubben. Shotwell did not report as income the amount by which the price it received exceeded the O. P. A. ceiling. The defendants claimed in their confessions and at their trial that they had to make these over-ceiling charges for candy to compensate for over-ceiling prices they paid for corn used in making corn syrup and other by-products necessary to the operation of their candy factory. The defendants' defense, therefore, was that all the overages paid to Shotwell by Lubben and his companies were paid out by Shotwell for raw corn and that, since the unreported income was virtually offset by unreported expenses, they were not guilty of the tax violations charged. The trial judge agreed with this view of the law and charged the jury that defendants were not guilty if the unreported income from candy was offset by unreported expenditures for corn. The crucial ques-

tions for the jury to determine, therefore, were how much money was paid by Lubben for candy and how much was paid by Shotwell for corn. The Government relied chiefly on the testimony and records of Lubben himself to show how much he had paid Shotwell. Thus, Lubben's truthfulness was a vital issue for the jury to consider. The prosecutor in addressing the jury vouched for the reliability of Lubben as an "honest, honorable American citizen," [28] the trial judge in passing sentence stated that he believed Lubben was telling the truth and that the 12 jurors had believed Lubben, and most importantly, it is clear that Lubben's testimony before the jury was significant and weighty evidence tending to peg the overpayments to Shotwell at a high level—well above the amount defendants claimed they received—and thus buttress a jury finding that more over-ceiling money was paid in for candy than went out for corn.

When this case was brought here the first time by the Government to secure reversal of the Court of Appeals holding that the Fifth Amendment rights of the defendants had been violated, the case was remanded because the Government presented "new evidence" in the form of affidavits which tended to show that the individual defendants had given perjurious testimony at the suppression hearing.[29] The District Court was instructed to hold new hearings and to make new findings of fact on the timeliness of the defendants' disclosure of unreported income and on the "good faith" of the defendants in so disclosing.

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[28] "I will tell you who David Lubben is. He is an honest, honorable American citizen, who is down here doing his duty, just the way you people are doing your duty." This is in marked contrast to a government prosecutor's argument to the jury in another case, where he said that Lubben was "a perjurer and a black marketeer and practically anything else you want to talk about." R. 2589, *Giglio* v. *United States,* 355 U. S. 339 (1958).

[29] 355 U. S. 233 (1957).

At these hearings on remand, the Government's star witness was one Huebner, a former Shotwell officer, who was supposed to have received most of the payments made to Shotwell by Lubben. Huebner testified that he thought Lubben had "lied on the stand" at the trial before the jury. Specifically, he stated that when Lubben recounted an instance in which he had paid one Shotwell officer $49,000, "it was a mistake on Lubben's part," that the officer had never received $49,000. Again, Huebner testified that no overages had been paid on some chocolate-covered nuts on which Lubben had claimed to have paid "in the neighborhood of $40,000." Huebner also testified, and there is other evidence in the record tending to show,[30] that one Tobias said he had helped Lubben doctor his books which were used against the defendants at the trial. In his written opinion, at the conclusion of the hearing, the judge admitted:

> ". . . that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable."

Although the judge made this finding, as the record compelled him to find, he nevertheless refused to grant the defendants a new trial before a new jury because he believed the other evidence proved the defendants guilty and that there had therefore been no "miscarriage of justice."

The effect of this action by the judge was to deny the defendants the right to have their guilt or innocence determined by a jury from all the evidence, including this new evidence discovered by the Government itself which so seriously impeaches the credibility of the main witness upon whose testimony the jury's verdicts of guilty rested. Those verdicts have now been shown to be tainted, some-

[30] R. 2556–2557, 2678–2679.

what like the verdict in *Mesarosh* v. *United States*, 352 U. S. 1 (1956). While that case was pending here on certiorari, the Government called our attention to the fact that one of the seven witnesses who had testified against the defendants had lied in other proceedings subsequent to the defendants' convictions. The Government insisted, however, that the witness' testimony had been truthful in its case and on that basis objected to the granting of a new trial but recommended a remand to the trial judge to determine whether the witness had in fact been truthful. We rejected that recommendation and held that the new evidence which undermined the credibility of the witness and which was produced by the Government itself required a new trial because the defendants' trial had become fatally tainted by these new disclosures. In the present case, after the defendants had been convicted, the Government came forward with evidence tending to show not merely that one among many witnesses but that its major witness had lied, not in other proceedings but on the central and determinative issue in this very case. Moreover, unlike *Mesarosh*, we have here an acknowledgment by the district judge that the testimony Lubben gave to the jury was probably exaggerated. In another case involving a charge by the defendants that it had discovered that the Government's witnesses were completely untrustworthy and should be accorded no credence, this Court remanded on these mere allegations in order to assure "findings upon untainted evidence," and said:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332. Therefore, fastidious regard for the honor of the administration

> of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party of the United States* v. *Subversive Activities Control Board,* 351 U. S. 115, 124 (1956). Compare *Mooney* v. *Holohan,* 294 U. S. 103 (1935).

I fear that the Court does not manifest that same "fastidious regard for the honor of the administration of justice" when it holds today that the defendants are not entitled to a new trial even though there are strong, compelling reasons to believe that the jury in this case did not base its guilty "findings upon untainted evidence."

It is true that in refusing to order a new trial when this point was argued to it, the Court of Appeals stated that it could not say that the district judge's observation that Lubben had exaggerated amounted to a charge of perjury.[31] And this Court likewise puts emphasis on the conclusion that there was no actual finding of perjury. But whether Lubben originally testified before the jury as a willful and deliberate perjurer or whether he somehow just inadvertently "exaggerated" the amounts he claimed to have paid these defendants, the effect on the jury was the same. No human being, not even the trial judge, is capable of saying that this jury would have convicted these defendants had Lubben sworn the whole truth when the jury listened to him. Moreover, in *Mesarosh* the Solicitor General conceded only that he believed that a witness against defendants had given testimony in other proceedings that was "untrue." There was no evidence that the witness had committed perjury, and the Solicitor General specifically refused to concede that he had. This Court nevertheless held that the witness' testimony was tainted because it was untruthful, and it

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[31] 287 F. 2d 667, 675 (C. A. 7th Cir. 1961).

set the convictions aside so that the defendants could get a new trial.[32] The Court here is therefore wrong in stating that the *Mesarosh* "conviction may be regarded or is conceded to have rested on perjured testimony." The Court, as I see it, is simply refusing to follow *Mesarosh* without saying why.

In refusing to remand this case for a new trial, the Court of Appeals relied on its conclusion that there was enough other innocent evidence in the record to support the conviction and on its observation that credibility of Lubben was a question for the jury.[33] As stated earlier, the district judge also had denied a new trial because he was satisfied that the other evidence showed that the defendants were guilty. But again, we have held that "it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the . . . findings." [34] Further, in *Mesarosh* we said, "The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case." [35] For this reason a new trial was ordered. A new trial is necessary in this case at which a jury will be privileged to hear all the relevant testimony and will be free to determine from an honest record whether these defendants are guilty. It advances nothing to say, as the Court of Appeals said, that credibility is for the jury. In this case, the new evidence offered by the government witness conclusively demonstrates that even the jury could

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[32] 352 U. S., at 9–12.

[33] 287 F. 2d., at 675.

[34] *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U. S. 115, 124 (1956).

[35] 352 U. S., at 12.

not properly weigh credibility at the time of the trial because these damaging sworn accusations against Lubben did not exist at that time.

Proper respect for the fairness and integrity of our judicial system demands that these defendants not be allowed to stand convicted upon a record containing evidence, the truthfulness of which has now been so thoroughly discredited. Neither the District Court, the Court of Appeals, nor this Court should usurp the constitutional function of the jury to determine the guilt or innocence of these defendants on untainted evidence. There is only one way the defendants can be given the constitutional rights that have been denied them in this case, and that is to reverse the case and remand for a new jury trial.

Moreover, by granting a new trial the Court would not only assure defendants the fair trial to which they are entitled but would also make it unnecessary for the Court to reach the important, grave, and difficult Fifth Amendment questions [36] discussed in Part I of this opinion. The general rule of this Court is to avoid reaching such constitutional issues when a case can be fairly disposed of on alternative grounds.[37] Although I have sometimes thought the rule has been carried to "a wholly unjustifiable extreme," [38] this case, it seems to me, offers to the strong adherents of that rule an ideal occasion for its application in the interests of justice, which would require that a new trial be granted.

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[36] See *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 246, 247 (1957) (dissenting opinion).

[37] *E. g., Communist Party, U. S. A.*, v. *Catherwood*, 367 U. S. 389, 392–395 (1961); *United States* v. *International Union United Automobile Workers*, 352 U. S. 567, 589–592 (1957). See also *Mapp* v. *Ohio*, 367 U. S. 643, 672, 675–677 (1961) (dissenting opinion).

[38] *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207, 213 (1960) (dissenting opinion).

CLEARY *v.* BOLGER.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 57. Argued November 14–15, 1962.—Decided January 14, 1963.

While a state criminal prosecution and a state administrative proceeding for revocation of his license were pending against respondent, he brought this suit in a Federal District Court to enjoin a state officer and certain federal officers from testifying in either proceeding about incriminating statements elicited from respondent while he was being illegally detained and interrogated by the federal officers. The state officer had been present during part of the interrogation but had not participated therein. Finding that the incriminating statements had been procured by the federal officers in violation of Federal Rule of Criminal Procedure 5 (a), the Court granted the injunction against them and the state officer. Only the state officer sought review in this Court. *Held:* The injunction against the state officer was improvidently granted. *Stefanelli* v. *Minard*, 342 U. S. 117, followed. *Rea* v. *United States*, 350 U. S. 214, distinguished. Pp. 392–401.

293 F. 2d 368, reversed.

Irving Malchman argued the cause for petitioner. With him on the briefs was *William P. Sirignano*.

Joseph Aronstein, by appointment of the Court, *post*, p. 805, argued the cause and filed a brief for respondent.

John T. Casey and *Benj. J. Jacobson* filed a brief for the New York State District Attorneys Association, as *amicus curiae*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case draws in question the propriety of the issuance of a federal injunction restraining petitioner, a state officer, from giving evidence in a pending state criminal prosecution and a state administrative proceeding.

The facts, as found by the two lower courts, are as follows. About 8:30 one Saturday morning in September

1959 federal Customs officers observed respondent, a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor, enter a deserted pier, carry out a cardboard carton, and place it in a car parked at the pier entrance. The officers, who were concerned about the recent frequency of thefts, particularly of liquor, in the New York waterfront area, followed respondent's car for a short distance and then ordered him to stop. A search of the automobile revealed that the cardboard carton contained only empty soda bottles, but that the glove compartment contained a number of spark plugs and windshield wipers, some of which were stamped "Made in England." Respondent was asked whether he had obtained any liquor from the piers, and he admitted that he had six or eight bottles at home which he had purchased from members of ships' crews who in turn, he said, had bought them from ships' stores.

The agents then took respondent into custody; he was brought to the Customs office, denied permission to use the telephone, and questioned until shortly before 11 a. m. During this period he signed a document consenting to a search of his home by the Customs officers, who had told him that the consent form was unnecessary since they already had enough information to warrant a search but that he might as well sign it to save them trouble. He had at first refused to sign such a consent without consulting a lawyer. The agents then drove respondent to his home in New Jersey and, without a search warrant, gave it a thorough search, which uncovered some 75 bottles of liquor, a Stenorette tape recording machine made in West Germany, and various other items of apparent foreign origin, such as perfumes, linens, costume jewelry, etc. These articles, thought to have been illegally acquired, were brought back to Customs headquarters in New York, where, starting about 4 p. m., respondent was again questioned.

By this time the Waterfront Commission, a bi-state agency of New York and New Jersey [1] which worked in close cooperation with the Customs Service in matters of law enforcement on the waterfront, had been informed of respondent's arrest, and two Commission detectives were present when the interrogation resumed. Petitioner Cleary was one of these detectives. After respondent had revealed that he maintained a tool room in the basement of an apartment house in New York, petitioner and a Customs officer accompanied respondent to this tool room, but nothing suspicious was discovered and they returned to Customs headquarters at 5:45 p. m.

After he had been told that he did not have to make a statement, respondent was sworn and interrogated by Customs officers in the presence of a Customs Service reporter, who recorded the questions and answers verbatim. Petitioner was present and could have participated in the questioning, though he did not do so.[2] Respondent admitted that with the exception of a few items that he had purchased from crew members most of the articles seized at his home had been taken by him from piers where he worked. He also said that he had taken the Stenorette tape recorder from a lighter moored at one of the piers. At 7:30 p. m. respondent was released.

No charges were lodged against respondent by the federal authorities. But a month later he was arrested by the New York City police on a charge of grand larceny for the theft of the Stenorette tape recorder, and shortly thereafter the Waterfront Commission temporarily suspended his licenses as hiring agent and longshoreman. The criminal charge was subsequently reduced to petit

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[1] See *De Veau* v. *Braisted*, 363 U. S. 144.

[2] The other Waterfront Commission detective, Machry, had apparently left the scene at an earlier stage. He was not joined as a defendant in the present action.

larceny and scheduled for trial in the Court of Special Sessions of New York City. A hearing looking to the revocation of respondent's licenses was deferred by the Waterfront Commission pending the outcome of the criminal case.

After the petit larceny charge had been set for trial, respondent instituted the present action in the United States District Court for the Southern District of New York seeking to enjoin the federal Customs officers and petitioner from using in evidence any of the seized property or his incriminating statement, and from testifying with respect thereto, in the state criminal trial or Waterfront Commission proceeding. He also sought return of the seized property.[3] The basis for the action was the claim that the seized property and the incriminating statement were the products of illegal conduct on the part of the federal officers.

The District Court granted such relief, limited however, to the property seized at respondent's home, to the incriminatory statement made following his arrest, and to testimony respecting these matters.[4] It held that the search and seizure at respondent's home violated Rule 41 (a) of the Federal Rules of Criminal Procedure,[5] in that it had

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[3] Respondent also instituted a second federal action against the Waterfront Commission and its members, seeking to enjoin the use of the same evidence in the license-revocation proceeding. That suit was dismissed by the District Court and is not involved here.

[4] The District Court held that respondent's arrest and the search of his automobile by the federal agents were not illegal, and also denied return of any of the property seized at respondent's home on the premise that it was contraband. Neither of those determinations is before us.

[5] Rule 41 (a): "*Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located."

been made without a search warrant, and that his incriminating statement had been procured in violation of Rule 5 (a) of those Rules,[6] in that respondent had not been taken before a United States Commissioner within a reasonable time after his arrest, and was also "the result . . . of the illegal search and seizure." In consequence of these illegalities an injunction against the federal officers was thought to follow. An injunction against petitioner was deemed necessary to make the injunction against the federal officials effective. 189 F. Supp. 237. The Court of Appeals affirmed by a divided vote. 293 F. 2d 368. Since the use of federal equity power in the premises presented important questions touching upon federal-state relationships in the realm of state criminal prosecutions, we brought the case here. 368 U. S. 984.

Accepting for present purposes the holdings of the two lower courts with respect to the conduct and enjoinability of the federal officers, we nevertheless conclude that the injunction against this petitioner was improvidently issued.[7]

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[6] Rule 5 (a): "*Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith." See *McNabb* v. *United States*, 318 U. S. 332.

[7] It should be noted that respondent did not allege in his complaint that the matter in controversy exceeded the sum or value of $10,000, or that diversity of citizenship existed. See 28 U. S. C. §§ 1331, 1332. Nor did he allege that the District Court had jurisdiction to enjoin petitioner incidental to its supervisory power over federal law enforcement agencies, cf. *Rea* v. *United States*, 350 U. S. 214, 217, or that 28 U. S. C. § 1343 conferred jurisdiction. But, in view of our determination that equitable power should not have been exercised with respect to this petitioner, it is not necessary to resolve the ques-

Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. This principle "is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue." *Stefanelli* v. *Minard,* 342 U. S. 117, 120. It has been manifested in numerous decisions of this Court involving a State's enforcement of its criminal law. *E. g., Pugach* v. *Dollinger,* 365 U. S. 458; *Douglas* v. *City of Jeannette,* 319 U. S. 157; *Watson* v. *Buck,* 313 U. S. 387; *Beal* v. *Missouri Pac. R. Co.,* 312 U. S. 45. The considerations that have prompted denial of federal injunctive relief affecting state prosecutions were epitomized in the *Stefanelli* case, in which this Court refused to sanction an injunction against state officials to prevent them from using in a state criminal trial evidence seized by state police in alleged violation of the Fourteenth Amendment:

> "[W]e would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." 342 U. S., at 123–124.

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tions whether the complaint stated a cause of action as to him or whether federal jurisdiction existed or was adequately invoked. See *Stefanelli* v. *Minard,* 342 U. S. 117, 120.

The two courts below recognized the validity of these considerations but thought that injunctive relief was nonetheless required by *Rea* v. *United States*, 350 U. S. 214. In that case the accused had been indicted in a federal court and had moved for an order under Rule 41 (e) of the Federal Rules of Criminal Procedure suppressing the use in evidence of certain narcotics seized under a search warrant invalid on its face. The District Court granted the motion. Despite the order, however, one of the federal officers who had secured the search warrant caused the accused to be rearrested and charged, in a state court, with possession of the same narcotics in violation of a state statute, and threatened to make the State's case by his testimony based on the evidence seized under the illegal federal warrant. The accused then moved in the Federal District Court to enjoin the federal agent from testifying in the state proceeding. This Court, invoking its "supervisory powers over federal law enforcement agencies" (*id.*, at 216–217), reversed the denial of an injunction and directed that the requested relief be granted in order to prevent frustration of the Federal Rules under which suppression had been ordered.[8] Both lower courts in the present case evidently took *Rea* to mean that federal officers transgressing the Federal Rules of Criminal Procedure may always be enjoined from utilizing their ill-gotten gains in a state criminal prosecution against the victim or from directly or indirectly passing them along to state authorities for such use.[9]

We need not, however, determine in this instance the correctness of the lower courts' broad reading of the *Rea*

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[8] Rule 41 (e) provides that the material suppressed "shall not be admissible in evidence at any hearing or trial."

[9] The Court of Appeals was also disposed to think that the propriety of the District Court's injunction was not affected by this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643, which came down after this case had left the District Court.

case, cf. *Wilson* v. *Schnettler,* 365 U. S. 381, on the basis of which the federal officers here were enjoined.[10] For in any event *Rea* does not support the injunction against this petitioner, a state official. The Court in *Rea* was at special pains to point out that the federal courts were not there "asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law," 350 U. S., at 216, and further that "[n]o injunction is sought against a state official," *id.,* at 217. The opinion is barren of any suggestion that any inroads on *Stefanelli* were intended.

It is no answer to say, as the Court of Appeals did, that this petitioner "is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity by federal agents," 293 F. 2d, at 369. For it is abundantly clear that the petitioner was present at these occurrences precisely and only because of his official connection with the Waterfront Commission. The District Court expressly found that it was "[t]he Waterfront Commission," not petitioner, which "had been informed of [respondent] Bolger's detention," 189 F. Supp., at 244, and that petitioner "was present at the questioning [of Bolger] as a representative of the Waterfront Commission," *id.,* at 255.

Nor can the injunctive relief against this petitioner find justification in the rationale that it was required in order to make the injunction against the federal officers effective. Such relief as to him must stand on its own bottom. We need not decide whether petitioner's status as a state official might be ignored had it been shown that he had misconducted himself in this affair, that he had been utilized by the federal officials as a means of shielding

[10] None of the federal officers involved in this action has sought review in this Court. And for reasons stated in this opinion there is otherwise no need for determining the propriety of the injunction as to them in order to dispose of the case before us.

their own alleged illegal conduct, or that he had received the evidence in direct violation of a federal court order. Here the District Court found that petitioner was not a factor in the federal investigation [11] and that his presence there was simply "the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront." 189 F. Supp., at 255.[12] On this record the upshot of the matter is that, insofar as this state official is concerned, nothing in *Rea* justifies disregard of the teachings of *Stefanelli*. Nor is the vitality of the principles on which the latter case rested sapped by this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643, overruling *Wolf* v. *Colorado*, 338 U. S. 25, which had refused to extend to the States the exclusionary rule of *Weeks* v. *United States*, 232 U. S. 383. For in denying the injunctive relief there sought *Stefanelli* expressly laid to one side any possible impact of *Wolf*. 342 U. S., at 119–120.

The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, cf., *e. g.*, *Mapp* v. *Ohio*,

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[11] "In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary was merely a witness to them." 189 F. Supp., at 256.

[12] We attach no significance to the District Court's remark that petitioner's "presence might have been an additional inducement to Bolger to answer questions more freely" (189 F. Supp., at 255) because Bolger, when originally picked up by the federal officers, had exhibited concern about the possible effect of his transgressions on his longshoreman's license. The record is barren of any evidence indicating that petitioner was brought into the situation for the purpose of intimidating Bolger or that he in fact did so.

supra, he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review.

To the extent that respondent's claims involve infractions merely of the Federal Criminal Rules, we need not decide whether an adverse state determination upon such claims would be reversible here. Cf., *e. g., Gallegos* v. *Nebraska,* 342 U. S. 55. For in any event we do not think that an injunction against this state official is justified in the circumstances of this case. Assuming that such relief was properly granted here as to the federal officials in the exercise of federal-court supervisory power over them, we consider that a supplementing injunction should not issue against a state official, at least where, as here, there is no evidence of a purpose to avoid federal requirements and the information has not been acquired by the state official in violation of a federal court order. Such direct intrusion in state processes does not comport with proper federal-state relationships.

We conclude that the injunction as to this petitioner should not have been granted, and that the judgment of the Court of Appeals must accordingly be

Reversed.

MR. JUSTICE GOLDBERG, concurring in the result.

I concur in the result. I cannot, however, join the Court's opinion, because I do not find it necessary in the present circumstances to pass upon the question whether *Rea* v. *United States,* 350 U. S. 214, may ever support an injunction against a state official who has received evidence illegally obtained by federal officers even though "there is no evidence of a purpose to avoid federal re-

quirements and the information has not been acquired by the state official in violation of a federal court order." For me consideration of that question is obviated by the commendably broad reading which the New York Court of Appeals has given this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643.[1] Because I strongly adhere to the principle, stated with clarity in *Stefanelli* v. *Minard*, 342 U. S. 117, 120, that the considerations governing whether a federal equity court should exercise its power here "touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States," I would avoid granting of injunctive relief in cases such as this where, because there is a substantial likelihood that the state courts will exclude the evidence at issue, such relief is not essential to vindication of an overriding federal policy governing conduct of federal officers. The virtual certainty of exclusion in the New York criminal proceedings and the likelihood of exclusion in the state administrative proceedings satisfy me that denial of the injunction here will not encourage federal officers to engage in illegal conduct. Thus, deterrence of such illegality, the consideration which in substantial part underlay the decision in *Rea*, is not a determining factor here and there is no need to grant injunctive relief to effectuate that policy.

In stating my position I rely on the New York Court of Appeals' announced view that it regards *Mapp* as extending to the "fruit of the poisonous tree," a holding arrived at on facts similar to those involved here. *People* v. *Rodriguez*, 11 N. Y. 2d 279, 286, 183 N. E. 2d 651, 653–

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[1] See, *e. g.*, *People* v. *Loria*, 10 N. Y. 2d 368, 179 N. E. 2d 478 (1961); *People* v. *O'Neill*, 11 N. Y. 2d 148, 182 N. E. 2d 95 (1962); *People* v. *Rodriguez*, 11 N. Y. 2d 279, 183 N. E. 2d 651 (1962).

654 (1962). It therefore appears that New York will exclude all the evidence here in question in the pending criminal proceedings. With reference to the Waterfront Commission hearing, I am well aware that the New York Court of Appeals has as yet taken no position on the applicability of *Mapp* in civil and administrative proceedings,[2] and that, indeed, the effect of the Fourth Amendment in civil cases in the federal courts is not totally settled.[3] However, in view of the encouragingly constructive approach of the New York courts to application of the *Mapp* decision, and of the "quasi-criminal" character of the pending Waterfront Commission proceedings, I nevertheless take the view, based upon *Stefanelli,* that the orderly way to proceed in this case is for New York to pass upon respondent's claims first.

The Court's opinion states that "To the extent that respondent's claims involve infractions merely of the Federal Criminal Rules, we need not decide whether an adverse state determination upon such claims would be reversible here." I, like the Court, do not reach this issue, but I so conclude because of my stated belief that New York will, under *Mapp,* likely exclude all the evidence in question here, a possibility which for me, because of my firm belief in the principles of *Stefanelli* v. *Minard, supra,* is sufficient to make the granting of injunctive relief here an unwise exercise of federal power. Whether it would be similarly excludible in such state proceedings were respondent's claims premised solely upon federal offi-

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[2] Compare *Bloodgood* v. *Lynch,* 293 N. Y. 308, 56 N. E. 2d 718 (1944), with *Sackler* v. *Sackler,* 16 App. Div. 2d 423, 229 N. Y. S. 2d 61 (2d Dept. 1962).

[3] Compare *Rogers* v. *United States,* 97 F. 2d 691 (C. A. 1st Cir. 1938), *United States* v. *Butler,* 156 F. 2d 897 (C. A. 10th Cir. 1946), and *United States* v. *Physic,* 175 F. 2d 338 (C. A. 2d Cir. 1949), with *United States* v. *One 1956 Ford Tudor Sedan,* 253 F. 2d 725 (C. A. 4th Cir. 1958).

cers' misbehavior in contravention of the Federal Rules of Criminal Procedure is a question which this Court has not decided.[4] There is a strong interest, which many decisions of this Court reflect, *e. g., McNabb* v. *United States,* 318 U. S. 332; *Mallory* v. *United States,* 354 U. S. 449, in ensuring compliance by federal officers with rules having the force of federal law, designed to safeguard the rights of citizens charged with criminal acts. Whether the Supremacy Clause of the Constitution compels state courts to enforce that interest by excluding evidence obtained by federal officers in violation of the Federal Criminal Rules, including reverse "silver platter" situations wherein illegally procured evidence has been handed over to state officers, will warrant serious consideration in an appropriate case. We need not and therefore do not decide that question here.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

I would agree with the judgment of the Court if we had here nothing but a question concerning the use of evidence obtained in violation of the Fourth Amendment. That question can now be raised in the state prosecution as a result of *Mapp* v. *Ohio,* 367 U. S. 643. My difficulties stem from a flagrant violation by federal officers of Rule 5 (a) of the Federal Rules of Criminal Procedure and the threatened use of the fruits of that violation by a state official in state cases. If the Court, as is strongly suggested, makes unreviewable here any adverse state determination on that claim, the only opportunity to correct the abuse of federal authority is here and now.

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[4] Nothing in *Gallegos* v. *Nebraska,* 342 U. S. 55, which did not involve activities of federal officers in violation of the Federal Criminal Rules, decides that question.

Federal customs agents suspected that thefts of liquor were occurring on the New York waterfront. Two agents stopped respondent Bolger on suspicion of theft at about 8 a. m. on Saturday, September 12, 1959. Their search of Bolger's car produced only a couple of windshield wipers and six spark plugs stamped "made in England," items that easily could have been purchased in New York. But, in response to the agents' questioning, Bolger admitted that he had at his home several bottles of liquor purchased from seamen. On the basis of this information the agents arrested Bolger at 9 a. m. Instead of taking him before a Commissioner as required by Rule 5 (a), Federal Rules of Criminal Procedure, they took him to headquarters for further questioning. There, after refusing his request to consult a lawyer and by employing trickery, the agents got Bolger to consent to a search of his home. The ensuing search, conducted at about 11 a. m., produced several items tending to incriminate Bolger. Upon returning to headquarters, further questioning produced damaging statements from him. Petitioner Cleary, an investigator for the Waterfront Commission of New York Harbor, was present at this later questioning at the invitation of the federal agents. Though he did not participate in this questioning, he was free to do so.

No federal prosecution was ever brought against Bolger. New York, however, instituted both a criminal prosecution and an administrative proceeding to revoke his license as a hiring agent. Bolger brought suit in the Federal District Court to enjoin the federal agents and Cleary from producing any of the material seized from him or testifying as to any of his statements in either of the state proceedings.

The District Court granted the relief requested with respect to all statements obtained after 11 a. m., at which time a Federal Commissioner was in his office a few blocks

from headquarters, and also all evidence obtained at Bolger's home. It held that the statements obtained both prior to and after the search were in violation of Rule 5 (a), and that the search and seizure violated both the Fourth Amendment and Rule 41 (a). 189 F. Supp. 237. The District Court relied on *Rea* v. *United States,* 350 U. S. 214, insofar as the federal agents were concerned; and it added that if the remedy did not extend to Cleary, whom it characterized as a "human recorder," federal agents would be free to flout the strictures imposed on them by *Rea* and the Federal Rules. The District Court concluded, "Cleary will be restrained not in his capacity as a state official but because he participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States." 189 F. Supp., at 256.

Only Cleary appealed; and the Court of Appeals affirmed on the authority of *Rea* v. *United States, supra.* 293 F. 2d 368. It said that the only difference between this case and *Rea* "is the time at which the federal officials attempt to make the results of their lawbreaking available to the state." *Id.,* at 369.

I think the Court of Appeals was correct in saying that "the Rea case [is] ample authority for holding that the order appealed from is not barred by 28 U. S. C. § 2283 as an injunction to stay proceedings in a state court." *Id.,* at 370. The proceedings themselves are not enjoined. Enjoining a state agent from offering as a witness unlawfully obtained evidence has no different effect on the "proceedings in a state court" than enjoining a federal officer. To be sure, in *Rea* there had been an earlier suppression order in a federal prosecution; and so it is now said that the injunction against testifying was necessary to protect or effectuate that suppression order. That answer proves too much, for it would enable federal agents themselves to violate the Federal Rules and, without fear of a federal

injunction, produce all their illegally obtained evidence in a state prosecution.

A state agent should be enjoined from producing, as a witness in a state court proceeding, evidence he acquired solely as a result of federal agents' violation of the Federal Rules.

Such an injunction should issue lest federal agents accomplish illegal results by boosting Oliver Twists through windows built too narrow by those Rules for their own ingress.* It is no answer to say that the state agent was merely a nonparticipating observer, or that Oliver Twist was an innocent child. The result produced, *viz.*, the Oliver Twist method of obtaining evidence in violation of the Federal Rules, is illegal and should not go unchecked.

"Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers . . . [to violate the provisions of the Federal Rules]. If, on the other hand, it is understood that the fruit of . . . unlawful . . . [conduct] by . . . [federal] agents will be inadmissible in a . . . [state] trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation"—to paraphrase an earlier opinion in a related area. See *Elkins* v.

*"It was a little lattice window, about five feet and a half above the ground: at the back of the house: which belonged to a scullery, or small brewing-place, at the end of the passage. The aperture was so small, that the inmates had probably not thought it worth while to defend it more securely; but it was large enough to admit a boy of Oliver's size, nevertheless. A very brief exercise of Mr. Sikes's art, sufficed to overcome the fastening of the lattice; and it soon stood wide open also." Dickens, The Adventures of Oliver Twist (N. Y.: Thomas Y. Crowell & Co.), p. 184.

United States, 364 U. S. 206, 221–222. Unless a federal court can enjoin a state agent under the facts of this case, the provisions of the Federal Rules will be subverted and an unhealthy form of state-federal cooperation will be encouraged.

What is involved is not an attempt by a federal court to interject itself into a state criminal prosecution to protect a defendant's federal rights against state infringement, as was the case in *Pugach* v. *Dollinger*, 365 U. S. 458, and *Stefanelli* v. *Minard*, 342 U. S. 117. In both of those cases the unlawfully obtained evidence had been obtained by state police. Here the evidence was obtained by federal agents in violation of the Federal Rules. It therefore involves no entrenchment on principles of federalism to hold that a Federal District Court may enjoin the production of such evidence in a state proceeding, regardless of who seeks to introduce it. The federal courts, rather than the state courts, have the responsibility of assuring that federal law-enforcement officers adhere to the procedures prescribed by the Federal Rules. This responsibility cannot be met if the federal courts' power can be thwarted by federal employment of a state Oliver Twist.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE concurs, dissenting.

I join in the dissenting opinion of my Brother DOUGLAS and add a few words in support of his conclusion.

I.

The Court concedes *arguendo* that it was proper to enjoin the federal officers from testifying in state proceedings against respondent as to the fruits of their violations of Rules 5 and 41 of the Federal Rules of Criminal Procedure. But having made this concession—compelled, I should think, by *Rea* v. *United States*, 350 U. S.

214 [1]—the Court then excludes petitioner from the injunction: "injunctive relief against this petitioner [cannot] find justification in the rationale that it was required in order to make the injunction against the federal officers effective. Such relief as to him must stand on its own bottom." The Court finds no "bottom," because petitioner did not himself violate the Federal Rules or otherwise misconduct himself. This reasoning, I submit, cannot withstand scrutiny.

In so refusing incidental relief against petitioner, surely the Court flouts settled principles of equity. Equity does not do justice by halves; its remedies are flexible. "A writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purposes of dispensing complete justice between the parties." *Tucker* v. *Carpenter,* 24 Fed. Cas. No. 14217 (Cir. Ct. D. Ark. 1841); see 1 Joyce, Injunctions (1909), § 2; 1 Pomeroy, Equity Jurisprudence (5th ed., Symons, 1941), § 114.[2] "Complete justice" has not been

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[1] In *Wilson* v. *Schnettler,* 365 U. S. 381, I joined the dissenting opinion of my Brother DOUGLAS because I thought (and still do) that the Court was making dangerous inroads upon the *Rea* decision. Happily, the Court in the instant case makes no suggestion that the authority of *Rea* has been impaired by *Wilson.* At all events *Wilson* is distinguishable from the case at bar, for here there was no failure to allege a violation of federal law and a lack of an adequate remedy at law.

[2] "The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit . . . . Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-

done if the fruits of the violations of federal law by federal officers may nevertheless be used against respondent in state proceedings by a state officer who witnessed, indeed abetted, those violations.

The vacation of the injunction against the state officer on the ground that he himself was not a wrongdoer wholly misconceives the nature of equitable relief. Such relief is not punitive but remedial, and it is measured not by the defendant's transgressions but by the plaintiff's needs. Thus, to protect a trade secret, equity will enjoin third persons to whom the secret has been divulged if they have notice of the breach of trust. See, *e. g., Colgate-Palmolive Co.* v. *Carter Products, Inc.*, 230 F. 2d 855, 864–865 (C. A. 4th Cir. 1956). Such third persons are not themselves malefactors, any more than this state officer is; they are enjoined in order to give the victim of the wrong effective protection. The respondent herein is entitled to effective protection against the federal officers' violations of federal law, which comprehends ancillary relief against petitioner *qua* witness to the unlawful conduct. Though innocent of the federal officers' misconduct, the state officer may not avail himself of its fruits to the harm of respondent. I repeat: the Court errs in asserting that the injunction against the state officer must stand on its own bottom; such a supplemental decree is fully justified, in accordance with the conventional principles of equity, by the issuance of an injunction against the federal officers.

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matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit . . . . The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree." 1 Pomeroy, *supra*.

The incidental nature of the relief granted against the state officer should dispel any fear that such relief threatens impairment of the harmonious workings of federalism. To be sure, it was part of the state officer's official duties to cooperate fully with federal officers. But it was no part of his duty to abet and facilitate federal officers' unlawful conduct. To enjoin him as a witness to such conduct does no more than forbid him to profit from it. In overruling the "silver platter" doctrine a few Terms ago, we anchored our holding in the disruptive effect upon the federal system of allowing the introduction into federal courts of evidence unlawfully seized by state officers. *Elkins* v. *United States,* 364 U. S. 206, 221. Surely the converse situation is no less productive of needless conflict. In truth, to enjoin the introduction into state courts of evidence unlawfully seized by federal officers is to promote, not retard, a healthy federalism.

In invoking the bogey of federal disruption of state criminal processes, the Court relies heavily on *Stefanelli* v. *Minard,* 342 U. S. 117, where it was held to be improper to enjoin the introduction in a state criminal trial of evidence seized by state officers in violation of the Fourteenth Amendment. But *Stefanelli* is manifestly inapt. That decision was compelled by *Wolf* v. *Colorado,* 338 U. S. 25, where the Court, while confirming that the Fourth Amendment had been absorbed into the Due Process Clause of the Fourteenth Amendment, nevertheless left the States free to devise appropriate remedies for violations of this constitutional protection. To have authorized the Federal District Courts to order the exclusion in state criminal trials of evidence unlawfully obtained by state officials would have sanctioned accomplishing indirectly what *Wolf* forbade directly. But *Wolf* has been overruled in this particular, *Mapp* v. *Ohio,* 367 U. S. 643, and the accommodation of *Wolf* which required the decision in *Stefanelli* is no longer a concern.

Moreover, the instant petitioner is not sought to be enjoined as a state officer whose misconduct ought to be remedied by the State, as was the case in *Stefanelli,* but as a witness to the misconduct of federal officers. The Federal Rules are not directed at state officers, nor was this state officer found to have engaged in conduct violative of them. Responsibility for enforcing the Federal Rules lies precisely with the federal courts, whereas under the regime of *Wolf* responsibility for enforcing the Fourteenth Amendment's right of privacy lay exclusively with the state court. Indeed, it is in light of the difference between violations of the Federal Rules and violations of the Fourteenth Amendment that the *Stefanelli* and *Rea* decisions emerge as perfectly consistent; and it is significant that the author of the Court's opinion in *Stefanelli* joined the Court's opinion in *Rea.*

It is also worth observing that Congress has taken pains to specify the conditions under which a federal court shall withhold injunctive relief in respect of a pending state court proceeding. See 28 U. S. C. § 2283. The Court nowhere mentions this provision, surely because its total inapplicability to the case at hand is plain: an injunction against this state officer would not stay the state proceedings against respondent but only preclude the use of certain evidence in them. Since Congress in § 2283 set out specific conditions for withholding federal equity relief, and these conditions have not been met in the case at bar, I submit that we are obligated to allow such relief to be granted in conformity with the accepted usages of equity procedure.

II.

With all respect I cannot share the view of my Brother GOLDBERG that relief should be denied here because the probable exclusion of the challenged evidence, in whole or part, by the New York courts would sufficiently serve to deter lawless conduct by federal officers. My view is

that equitable actions grounded in violations of the Federal Rules of Criminal Procedure should be governed by the accepted principles of equity. Among them is the principle that an adequate remedy at law bars equitable relief. This principle seems to me to be applicable even where the remedy is given by the state courts, so long as the source of the remedy is federal law. See *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121, 126–127. I further believe that one who has an adequate remedy by way of appeal, as well as one who has a more conventional adequate remedy at law, is thereby disbarred from equitable relief. 1 Joyce, *supra,* § 29. But for a remedy to be adequate, it must have more than a merely theoretical availability. If "a court of law can do as complete justice to the matter in controversy . . . as could be done by a court of equity, equity will not interfere . . . . But in order that the general principle may apply, the sufficiency and completeness of the legal remedy must be certain; if it is doubtful, equity may take cognizance." 1 Pomeroy, *supra,* § 176. How certain, complete, and sufficient is the remedy by way of appeal in the instant case? My Brother GOLDBERG concedes uncertainty as to whether the New York courts, though they have generously interpreted *Mapp* v. *Ohio, supra,* will exclude all the challenged evidence involved in this case, or whether *Mapp* or any other decision of this Court compels such exclusion. Nor is it certain that a State is obliged to exclude evidence which is the product of violations of the Federal Rules—no decision of this Court has yet so held and *Rea* was premised on a contrary assumption, see 350 U. S., at 217; *Wilson* v. *Schnettler, supra,* at 391 (dissenting opinion)—and finally, while petitioner herein was enjoined from testifying in the state administrative proceeding against respondent, as well as in the criminal proceeding, it has not yet been settled whether *Mapp* applies to administrative proceedings.

Thus, to remit respondent to his remedy by appeal in the state courts is to set him adrift on a sea of legal uncertainties, and very possibly to deprive him, in the end, of any remedy whatever. Since respondent's remedy by law is uncertain, conventional equity principles require that the injunction issue against this state officer, premised not on constitutional grounds but on violations of the Federal Rules by federal officers.[3]

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[3] The Court's intimation, in note 7 of the opinion, of doubt as to the existence of federal jurisdiction in the instant case seems to me totally unwarranted. The Court was unanimous in *Rea* as to the existence of federal jurisdiction; the only dispute was as to the propriety of exercising it. See 350 U. S., at 219 (dissenting opinion). To predicate federal jurisdiction in the instant case, we need not decide whether the Federal Rules are civil rights statutes within the intent of 28 U. S. C. § 1343 (4), nor need we resort to any other jurisdictional statute. For the federal courts have the inherent authority to issue orders to protect their processes, here, as in *Rea*, governed by the Federal Rules of Criminal Procedure. See 350 U. S., at 217; *Wise* v. *Henkel*, 220 U. S. 556, 558.

Syllabus.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* BUTTON, ATTORNEY GENERAL OF VIRGINIA, ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 5. Argued November 8, 1961.—Restored to the calendar for reargument April 2, 1962.—Reargued October 9, 1962.—Decided January 14, 1963.

1. Petitioner sued in a Federal District Court to enjoin enforcement of a Virginia statute on the ground that, as applied to it, the statute violated the Fourteenth Amendment. The District Court abstained from passing on the validity of the statute pending an authoritative interpretation of it by the state courts; but it retained jurisdiction. Petitioner then applied to a state court for a binding adjudication of all of its claims and a permanent injunction and declaratory relief, and it made no reservation to the disposition of the entire case by the state courts. A state trial court held the statute to be both constitutional and applicable to petitioner, and this decision was affirmed by the Virginia Supreme Court of Appeals. Petitioner then petitioned this Court for a writ of certiorari to review the decision of the Virginia Supreme Court of Appeals, and this Court granted certiorari. *Held:* The District Court's reservation of jurisdiction was purely formal; it did not impair the jurisdiction of this Court to review an otherwise final state court judgment; the judgment below was "final," within the meaning of 28 U. S. C. § 1257; and the case is properly before this Court. Pp. 427–428.

2. Chapter 33 of the Virginia Acts of Assembly, Extra Sess. 1956, amended former statutes defining and punishing malpractice by attorneys so as to broaden the definition of solicitation of legal business to include acceptance of employment or compensation from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it. It also made it an offense for any such person or organization to solicit business for any attorney. Petitioner, a corporation whose major purpose was the elimination of racial discrimination, sued in a state court to enjoin enforcement of this Chapter and for a declaratory judg-

ment that, as applied to petitioner, its affiliates, officers, members, attorneys retained or paid by it, and litigants to whom it might give assistance in cases involving racial discrimination, the Chapter violated the Fourteenth Amendment. The Court found that petitioner, through its State Conference, had formed a legal staff to direct actions pertaining to racial discrimination; urged the institution of suits to challenge racial discrimination; offered the services of attorneys selected and paid by it and its affiliates; and, with its affiliates, controlled the conduct of such litigation. *Held:* The activities of petitioner, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics. Pp. 417–445.

(a) Although petitioner is a corporation, it may assert its right and that of its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their constitutionally guaranteed rights. P. 428.

(b) Abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. P. 429.

(c) In the context of petitioner's objectives, litigation is not a means of resolving private differences; it is a form of political expression and a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local, for the members of the Negro community. Pp. 429–430.

(d) In order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, it is not necessary to subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly, for there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Pp. 430–431.

(e) Under Chapter 33, as authoritatively construed by the Virginia Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances; there thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of

litigation on behalf of the rights of Negroes; and, as so construed, Chapter 33 violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association. Pp. 431–438.

(f) It is no answer to the constitutional claims asserted by petitioner to say, as did the Virginia Supreme Court of Appeals, that the purpose of this statute was merely to insure high professional standards and not to curtail freedom of expression, for a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. Pp. 438–439.

(g) However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of petitioner's activities disclosed by this record. Pp. 439–443.

(h) Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Pp. 443–444.

(i) Although petitioner has amply shown that its activities fall within the protection of the First Amendment, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. P. 444.

202 Va. 142, 116 S. E. 2d 55, reversed.

Robert L. Carter reargued the cause for petitioner. With him on the briefs was *Frank D. Reeves.*

Henry T. Wickham reargued the cause for respondents. With him on the brief was *David J. Mays.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case originated in companion suits by the National Association for the Advancement of Colored People, Inc. (NAACP), and the NAACP Legal Defense and Educational Fund, Inc. (Defense Fund), brought in 1957 in the United States District Court for the Eastern District of Virginia. The suits sought to restrain the enforcement of Chapters 31, 32, 33, 35 and 36 of the Virginia Acts of Assembly, 1956 Extra Session, on the ground that the

statutes, as applied to the activities of the plaintiffs, violated the Fourteenth Amendment. A three-judge court convened pursuant to 28 U. S. C. § 2281, after hearing evidence and making fact-findings, struck down Chapters 31, 32 and 35 but abstained from passing upon the validity of Chapters 33 and 36 pending an authoritative interpretation of these statutes by the Virginia courts.[1] The complainants thereupon petitioned in the Circuit Court of the City of Richmond to declare Chapters 33 and 36 inapplicable to their activities, or, if applicable, unconstitutional. The record in the Circuit Court was that made before the three-judge court supplemented by additional evidence. The Circuit Court held the chapters to be both applicable and constitutional. The holding was sustained by the Virginia Supreme Court of Appeals as to Chapter 33, but reversed as to Chapter 36, which was held unconstitutional under both state and federal law.[2] Thereupon the Defense Fund returned to the Federal District Court, where its case is presently pending, while the NAACP filed the instant petition. We granted certiorari. 365 U. S. 842.[3] We heard argument in the 1961 Term

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[1] *NAACP* v. *Patty*, 159 F. Supp. 503 (D. C. E. D. Va. 1958). On direct appeal under 28 U. S. C. § 1253, from the judgment striking down Chapters 31, 32 and 35, this Court reversed, remanding with instructions to permit the complainants to seek an authoritative interpretation of the statutes in the Virginia courts. *Harrison* v. *NAACP*, 360 U. S. 167. In ensuing litigation, the Circuit Court of the City of Richmond held most of the provisions of the three chapters unconstitutional. *NAACP* v. *Harrison*, Chancery causes No. B–2879 and No. B–2880, Aug. 31, 1962.

[2] *NAACP* v. *Harrison*, 202 Va. 142, 116 S. E. 2d 55 (1960). Chapter 36, which is codified in § 18.1–394 *et seq.*, Code of Virginia (1960 Repl. Vol.), prohibits the advocacy of suits against the Commonwealth and the giving of any assistance, financial or otherwise, to such suits.

[3] Certiorari was first granted *sub nom. NAACP* v. *Gray*. The litigation began *sub nom. NAACP* v. *Patty, Attorney General of*

and ordered reargument this Term. 369 U. S. 833. Since no cross-petition was filed to review the Supreme Court of Appeals' disposition of Chapter 36, the only issue before us is the constitutionality of Chapter 33 as applied to the activities of the NAACP.

There is no substantial dispute as to the facts; the dispute centers about the constitutionality under the Fourteenth Amendment of Chapter 33, as construed and applied by the Virginia Supreme Court of Appeals to include NAACP's activities within the statute's ban against "the improper solicitation of any legal or professional business."

The NAACP was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some 1,000 active unincorporated branches throughout the Nation. The corporation is licensed to do business in Virginia, and has 89 branches there. The Virginia branches are organized into the Virginia State Conference of NAACP Branches (the Conference), an unincorporated association, which in 1957 had some 13,500 members. The activities of the Conference are financed jointly by the national organization and the local branches from contributions and membership dues. NAACP policy, binding upon local branches and conferences, is set by the annual national convention.

The basic aims and purposes of NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an exten-

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Virginia. During the course of the litigation the names of successive holders of that office have been substituted as party respondent. See Supreme Court Rule 48, par. 3, as amended. 366 U. S. 979.

sive program of assisting certain kinds of litigation on behalf of its declared purposes. For more than 10 years, the Virginia Conference has concentrated upon financing litigation aimed at ending racial segregation in the public schools of the Commonwealth.

The Conference ordinarily will finance only cases in which the assisted litigant retains an NAACP staff lawyer to represent him.[4] The Conference maintains a legal staff of 15 attorneys, all of whom are Negroes and members of the NAACP. The staff is elected at the Conference's annual convention. Each legal staff member must agree to abide by the policies of the NAACP, which, insofar as they pertain to professional services, limit the kinds of litigation which the NAACP will assist. Thus the NAACP will not underwrite ordinary damages actions, criminal actions in which the defendant raises no question of possible racial discrimination, or suits in which the plaintiff seeks separate but equal rather than fully desegregated public school facilities. The staff decides whether a litigant, who may or may not be an NAACP member, is entitled to NAACP assistance. The Conference defrays all expenses of litigation in an assisted case, and usually, although not always, pays each lawyer on the case a per diem fee not to exceed $60, plus out-of-pocket expenses. The assisted litigant receives no money from the Conference or the staff lawyers. The staff member may not accept, from the litigant or any other source, any other compensation for his services in an NAACP-assisted case. None of the staff receives a salary or retainer from the NAACP; the per diem fee is paid only for professional services in a particular case. This per diem payment is

[4] However, the record contains two instances where Negro litigants had retained attorneys, not on the legal staff, prior to seeking financial assistance from the Conference. The Conference rendered substantial financial assistance in both cases. In one case the Conference paid the attorney's fee.

smaller than the compensation ordinarily received for equivalent private professional work. The actual conduct of assisted litigation is under the control of the attorney, although the NAACP continues to be concerned that the outcome of the lawsuit should be consistent with NAACP's policies already described. A client is free at any time to withdraw from an action.

The members of the legal staff of the Virginia Conference and other NAACP or Defense Fund lawyers called in by the staff to assist are drawn into litigation in various ways. One is for an aggrieved Negro to apply directly to the Conference or the legal staff for assistance. His application is referred to the Chairman of the legal staff. The Chairman, with the concurrence of the President of the Conference, is authorized to agree to give legal assistance in an appropriate case. In litigation involving public school segregation, the procedure tends to be different. Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting authorizing him, and other NAACP or Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation. On occasion, blank forms have been signed by litigants, upon the understanding that a member or members of the legal staff, with or without assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. It is usual, after obtaining authorizations, for the staff lawyer to bring into the case the other staff members in the area where suit is to be brought, and sometimes to bring in lawyers from the national organization or the Defense Fund.[5] In effect, then, the prospec-

[5] The Defense Fund, which is not involved in the present phase of the litigation, is a companion body to the NAACP. It is also a nonprofit New York corporation licensed to do business in Virginia,

tive litigant retains not so much a particular attorney as the "firm" of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation.

These meetings are sometimes prompted by letters and bulletins from the Conference urging active steps to fight segregation. The Conference has on occasion distributed to the local branches petitions for desegregation to be signed by parents and filed with local school boards, and advised branch officials to obtain, as petitioners, persons willing to "go all the way" in any possible litigation that may ensue. While the Conference in these ways encourages the bringing of lawsuits, the plaintiffs in particular actions, so far as appears, make their own decisions to become such.[6]

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and has the same general purposes and policies as the NAACP. The Fund maintains a legal staff in New York City and retains regional counsel elsewhere, one of whom is in Virginia. Social scientists, law professors and law students throughout the country donate their services to the Fund without compensation. When requested by the NAACP, the Defense Fund provides assistance in the form of legal research and counsel.

[6] Seven persons who were or had been plaintiffs in Virginia public school suits did testify that they were unaware of their status as plaintiffs and ignorant of the nature and purpose of the suits to which they were parties. It does not appear, however, that the NAACP had been responsible for their involvement in litigation. These plaintiffs testified that they had attended meetings of parents without grasping the meaning of the discussions, had signed authorizations either without reading or without understanding them, and thereafter had paid no heed to the frequent meetings of parents called to keep them abreast of legal developments. They also testified that they were not accustomed to read newspapers or listen to the radio. Thus they seem to have had little grasp of what was going on in the communities. Two of these seven plaintiffs had been persuaded to sign authorizations by their own children, who had picked up forms at NAACP meetings. Five were plaintiffs in the Prince Edward County

Statutory regulation of unethical and nonprofessional conduct by attorneys has been in force in Virginia since 1849. These provisions outlaw, *inter alia,* solicitation of legal business in the form of "running" or "capping." Prior to 1956, however, no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for many years in substantially the manner described. In 1956, however, the legislature amended, by the addition of Chapter 33, the provisions of the Virginia Code forbidding solicitation of legal business by a "runner" or "capper" to include, in the definition of "runner" or "capper," an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.[7]

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school litigation, in which 186 persons were joined as plaintiffs. See *NAACP* v. *Patty,* 159 F. Supp. 503, 517 (D. C. E. D. Va. 1958).

[7] Code of Virginia, 1950, §§ 54–74, 54–78, and 54–79, as amended by Acts of 1956, Ex. Sess., c. 33 (Repl. Vol. 1958), read in pertinent part as follows (amendments in italics):

"§ 54–74. . . . If the Supreme Court of Appeals, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended.

. . . . . .

"Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

. . . . . .

"'Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct,' as used in this section, shall be construed to include the improper solicitation of any legal or profes-

The Virginia Supreme Court of Appeals held that the chapter's purpose "was to strengthen the existing statutes to further control the evils of solicitation of legal business . . . ." 202 Va., at 154, 116 S. E. 2d, at 65. The

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sional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of article 7 of this chapter* [§§ *54–78 to 54–83.1*], or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; *provided, however, that nothing contained in this article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused of violating the provisions of article 7 of this chapter.*

. . . .

"§ 54–78. . . . (1) A 'runner' or 'capper' is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability,* in the solicitation or procurement of business for such attorney at law * *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*

"The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.

"(2) An 'agent' is one who represents another in dealing with a third person or persons. [*Footnote 7 continued on p. 425*]

court held that the activities of NAACP, the Virginia Conference, the Defense Fund, and the lawyers furnished by them, fell within, and could constitutionally be proscribed by, the chapter's expanded definition of improper solicitation of legal business, and also violated Canons 35 and 47 of the American Bar Association's Canons of Professional Ethics, which the court had

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"§ 54–79. . . . It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper * *as defined in § 54–78* to solicit any business for * *an attorney at law or such person, partnership, corporation, organization or association,* in and about the State prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, police courts, * *county* courts, municipal courts, * courts *of record,* or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever." Code of Virginia, 1950, §§ 54–82, 54–83.1, as amended (Repl. Vol. 1958), provide:

"§ 54.82. Penalty for violation.—Any person, corporation, partnership or association violating any of the provisions of this article shall be guilty of a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not less than one month nor more than six months, or by both such fine and imprisonment. . . .

"§ 54–83.1. Injunction against running, capping, soliciting and maintenance.—The Commonwealth's attorney, or any person, firm or corporation against whom any claim for damage to property or damages for personal injuries or for death resulting therefrom, is or has been asserted, may maintain a suit in equity against any person who has solicited employment for himself or has induced another to solicit or encourage his employment, or against any person, firm, partnership or association which has acted for another in the capacity of a runner or capper or which has been stirring up litigation in such a way as to constitute maintenance whether such solicitation was successful or not, to enjoin and permanently restrain such person, his agents, representatives and principals from soliciting any such claims against any person, firm or corporation subsequent to the date of the injunction."

adopted in 1938.[8] Specifically the court held that, under the expanded definition, such activities on the part of NAACP, the Virginia Conference, and the Defense Fund constituted "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control." 202 Va., at 155; 116 S. E. 2d, at 66. Finally, the court restated the decree of the Richmond Circuit Court. We have excerpted the pertinent portion of the court's holding in the margin.[9]

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[8] 171 Va., pp. xxxii–xxxiii, xxxv (1938). Canon 35 reads in part as follows:

"*Intermediaries.*—The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries." Canon 47 reads as follows:

"*Aiding the Unauthorized Practice of Law.*—No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

[9] "[T]he solicitation of legal business by the appellants, their officers, members, affiliates, voluntary workers and attorneys, as shown by the evidence, violates chapter 33 and the canons of legal ethics;

". . . attorneys who accept employment by appellants to represent litigants in suits solicited by the appellants, or those associated with them, are violating chapter 33 and the canons of legal ethics;

. . . . .

". . . appellants and those associated with them may not be prohibited from acquainting persons with what they believe to be their legal rights and advising them to assert their rights by commencing or further prosecuting a suit against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person

I.

A jurisdictional question must first be resolved: whether the judgment below was "final" within the meaning of 28 U. S. C. § 1257. The three-judge Federal District Court retained jurisdiction of this case while an authoritative construction of Chapters 33 and 36 was being sought in the Virginia courts Cf. *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 173. The question of our jurisdiction arises because, when the case was last here, we observed that such abstention to secure state court interpretation "does not, of course, involve the abdication [by the District Court] of federal jurisdiction, but only the postponement of its exercise . . . ." *Harrison* v. *NAACP*, 360 U. S. 167, 177. We meant simply that the District Court had properly retained jurisdiction, since a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim. Where, however, the party remitted to the state courts elects to seek a complete and final adjudication of his rights in the state courts, the District Court's reservation of jurisdiction is purely formal, and does not impair our jurisdiction to review directly an otherwise final state court judgment. *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45. We think it clear that petitioner made such an

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acting as an officer or employee of such, but in so advising persons to commence or further prosecute such suits the appellants, or those associated with them, shall not solicit legal business for their attorneys or any particular attorneys; and

"(b) the appellants and those associated with them may not be prohibited from contributing money to persons to assist them in commencing or further prosecuting such suits, which have not been solicited by the appellants or those associated with them, and channeled by them to their attorneys or any other attorneys." 202 Va., at 164–165, 116 S. E. 2d, at 72.

election in the instant case, by seeking from the Richmond Circuit Court "a binding adjudication" of all its claims and a permanent injunction as well as declaratory relief, by making no reservation to the disposition of the entire case by the state courts, and by coming here directly on certiorari. Therefore, the judgment of the Virginia Supreme Court of Appeals was final, and the case is properly before us.

II.

Petitioner challenges the decision of the Supreme Court of Appeals on many grounds. But we reach only one: that Chapter 33 as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth.[10] More specifically, petitioner claims that the chapter infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. Cf. *Grosjean* v. *American Press Co.*, 297 U. S. 233. We also think petitioner has standing to assert the corresponding rights of its members. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 458–460; *Bates* v. *City of Little Rock*, 361 U. S. 516, 523, n. 9; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296.

We reverse the judgment of the Virginia Supreme Court of Appeals. We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and

[10] Petitioner also claims that Chapter 33 as construed denies equal protection of the laws, and is so arbitrary and irrational as to deprive petitioner of property without due process of law.

Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.[11]

A.

We meet at the outset the contention that "solicitation" is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. *Thomas* v. *Collins,* 323 U. S. 516, 537; *Herndon* v. *Lowry,* 301 U. S. 242, 259–264. Cf. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Stromberg* v. *California,* 283 U. S. 359, 369; *Terminiello* v. *Chicago,* 337 U. S. 1, 4. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.[12] Just as it was true of the

[11] It is unclear—and immaterial—whether the Virginia court's opinion is to be read as holding that NAACP's activities violated the Canons *because* they violated Chapter 33, or as reinforcing its holding that Chapter 33 was violated by finding an independent violation of the Canons. Our holding that petitioner's activities are constitutionally protected applies equally whatever the source of Virginia's attempted prohibition.

[12] Murphy, The South Counterattacks: The Anti-NAACP Laws, 12 W. Pol. Q. 371 (1959). See Bentley, The Process of Government:

opponents of New Deal legislation during the 1930's,[13] for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right "to engage in association for the advancement of beliefs and ideas." *NAACP* v. *Alabama, supra,* at 460. We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. *Thomas* v. *Collins, supra.* We have said that the Sherman Act does not apply to certain concerted activities of railroads "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" because "such a construction of the Sherman Act would raise important constitutional questions," specifically, First Amendment questions. *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S.

A Study of Social Pressures (1908); Rosenblum, Law as a Political Instrument (1955); Peltason, Federal Courts in the Political Process (1955); Truman, The Governmental Process: Political Interests and Public Opinion (1955); Vose, The National Consumers' League and the Brandeis Brief, 1 Midw. J. of Pol. Sci. 267 (1957); Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale L. J. 574 (1949).

[13] Cf. Opinion 148, Committee on Professional Ethics and Grievances, American Bar Association (1935), ruling that the Liberty League's program of assisting litigation challenging New Deal legislation did not constitute unprofessional conduct.

127, 138. And we have refused to countenance compelled disclosure of a person's political associations in language closely applicable to the instant case:

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups . . . ." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250–251 (plurality opinion). Cf. *De Jonge* v. *Oregon,* 299 U. S. 353, 364–366.

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

B.

Our concern is with the impact of enforcement of Chapter 33 upon First Amendment freedoms. We start, of course, from the decree of the Supreme Court of Appeals. Although the action before it was one basically for declaratory relief, that court not only expounded the purpose and reach of the chapter but held concretely that certain of petitioner's activities had, and certain others had not,

violated the chapter. These activities had been explored in detail at the trial and were spread out plainly on the record. We have no doubt that the opinion of the Supreme Court of Appeals in the instant case was intended as a full and authoritative construction of Chapter 33 as applied in a detailed factual context. That construction binds us. For us, the words of Virginia's highest court are the words of the statute. *Hebert* v. *Louisiana,* 272 U. S. 312, 317. We are not left to speculate at large upon the possible implications of bare statutory language.

But it does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful by the Supreme Court of Appeals are constitutionally privileged. If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. See *Smith* v. *California,* 361 U. S. 147, 151; *Winters* v. *New York,* 333 U. S. 507, 509–510, 517–518; *Herndon* v. *Lowry,* 301 U. S. 242; *Stromberg* v. *California,* 283 U. S. 359; *United States* v. *C. I. O.,* 335 U. S. 106, 142 (Rutledge, J., concurring). Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U. S. 88, 97–98; *Winters* v. *New York, supra,* at 518–520. Cf. *Staub* v. *City of Baxley,* 355 U. S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The

objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.[14] Cf. *Marcus* v. *Search Warrant,* 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith* v. *California, supra,* at 151–154; *Speiser* v. *Randall,* 357 U. S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U. S. 296, 311.

We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We cannot accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the Supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33. In the second place, the decree does not seem to rest on the fact

[14] Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, 75–76, 80–81, 96–104 (1960).

that the attorneys were organized as a staff and paid by petitioner. The decree expressly forbids solicitation on behalf of "any particular attorneys" in addition to attorneys retained or compensated by the NAACP. In the third place, although Chapter 33 purports to prohibit only solicitation by attorneys or their "agents," it defines agent broadly as anyone who "represents" another in his dealings with a third person. Since the statute appears to depart from the common-law concept of the agency relationship and since the Virginia court did not clarify the statutory definition, we cannot say that it will not be applied with the broad sweep which the statutory language imports.

We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to do what the decree purports to allow, namely, acquaint "persons with what they believe to be their legal rights and . . . [advise] them to assert their rights by commencing or further prosecuting a suit . . . ." For if the lawyers, members or sympathizers also appeared in or had any connection with any litigation supported with NAACP funds contributed under the provision of the decree by which the NAACP is not prohibited "from contributing money to persons to assist them in commencing or further prosecuting such

suits," they plainly would risk (if lawyers) disbarment proceedings and, lawyers and nonlawyers alike, criminal prosecution for the offense of "solicitation," to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; [15] litigation assisted by the NAACP has been bitterly fought.[16] In such circumstances, a statute

[15] See *NAACP* v. *Patty*, 159 F. Supp. 503, 516–517 (D. C. E. D. Va. 1958); *Davis* v. *County School Board*, 149 F. Supp. 431, 438–439 (D. C. E. D. Va. 1957), rev'd on other grounds *sub nom. Allen* v. *County School Board*, 249 F. 2d 462 (C. A. 4th Cir.); Muse, Virginia's Massive Resistance (1961), *passim*.

[16] See, *e. g.*, *County School Bd.* v. *Thompson*, 240 F. 2d 59, 64 (C. A. 4th Cir. 1956) (conduct of defendant termed a "clear manifestation of an attitude of intransigence . . ."); *James* v. *Duckworth*, 170 F. Supp. 342, 350 (D. C. E. D. Va. 1959), aff'd, 267 F. 2d 224 (C. A. 4th Cir.); *Allen* v. *County School Bd.*, 266 F. 2d 507 (C. A. 4th Cir. 1959); *Allen* v. *County School Bd.*, 198 F. Supp. 497, 502 (D. C. E. D. Va. 1961). Most NAACP-assisted litigation in Virginia in recent years has been litigation challenging public school segregation. The sheer mass of such (and related) litigation is an indication of the intensity of the struggle: ALEXANDRIA: *Jones* v. *School Bd.*, 179 F. Supp. 280 (D. C. E. D. Va. 1959); *Jones* v. *School Bd.*, 278 F. 2d 72 (C. A. 4th Cir. 1960); ARLINGTON: *County School Bd.* v. *Thompson*, 240 F. 2d 59 (C. A. 4th Cir. 1956); *Thompson* v. *County School Bd.*, 144 F. Supp. 239 (D. C. E. D. Va. 1956); 159 F. Supp. 567 (D. C. E. D. Va. 1957); 166 F. Supp. 529 (D. C. E. D. Va. 1958); 252 F. 2d 929 (C. A. 4th Cir. 1958); 2 Race Rel. 810 (D. C. E. D. Va. 1957); 4 Race Rel. 609 (D. C. E. D. Va. 1959); 4 Race Rel. 880 (D. C. E. D. Va. 1959); *Hamm* v. *School Bd. of Arlington Co.*, 263 F. 2d 226 (C. A. 4th Cir. 1959); 264 F. 2d 945 (C. A. 4th Cir. 1959). CHARLOTTESVILLE: *School Bd.* v. *Allen*, 240 F. 2d 59 (C. A. 4th Cir. 1956); *Allen* v. *School Bd.*, 1 Race Rel. 886 (D. C. W. D. Va. 1956); 2 Race

broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however even-handed its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

Rel. 986 (D. C. W. D. Va. 1957); 3 Race Rel. 937 (D. C. W. D. Va. 1958); 4 Race Rel. 881 (D. C. W. D. Va. 1959); 263 F. 2d 295 (C. A. 4th Cir. 1959); 203 F. Supp. 225 (D. C. W. D. Va. 1961); *Dodson* v. *School Bd.*, 289 F. 2d 439 (C. A. 4th Cir. 1961); *Dillard* v. *School Bd.*, 308 F. 2d 920 (C. A. 4th Cir. 1962). FAIRFAX COUNTY: *Blackwell* v. *Fairfax Co. School Bd.*, 5 Race Rel. 1056 (D. C. E. D. Va. 1960). FLOYD COUNTY: *Walker* v. *Floyd Co. School Bd.*, 5 Race Rel. 1060 (D. C. W. D. Va. 1960); 5 Race Rel. 714 (D. C. W. D. Va. 1960). GRAYSON COUNTY: *Goins* v. *County School Bd.*, 186 F. Supp. 753 (D. C. W. D. Va. 1960); 282 F. 2d 343 (C. A. 4th Cir. 1960). NORFOLK: *Beckett* v. *School Bd.*, 2 Race Rel. 337 (D. C. E. D. Va. 1957); 148 F. Supp. 430 (D. C. E. D. Va. 1957); 3 Race Rel. 942–964 (D. C. E. D. Va. 1958); 260 F. 2d 18 (C. A. 4th Cir. 1958); 246 F. 2d 325 (C. A. 4th Cir. 1957); 181 F. Supp. 870 (D. C. E. D. Va. 1959); 185 F. Supp. 459 (D. C. E. D. Va. 1959); *Farley* v. *Turner*, 281 F. 2d 131 (C. A. 4th Cir. 1960); *Hill* v. *School Bd.*, 282 F. 2d 473 (C. A. 4th Cir. 1960); *James* v. *Duckworth*, 170 F. Supp. 342 (D. C. E. D. Va. 1959); 267 F. 2d 224 (C. A. 4th Cir. 1959); *Adkinson* v. *School Bd. of Newport News*, 3 Race Rel. 938 (D. C. E. D. Va. 1958); *Adkins* v. *School Bd. of Newport News*, 148 F. Supp. 430 (D. C. E. D. Va. 1957); 2 Race Rel. 334 (D. C. E. D. Va. 1957); 246 F. 2d 325 (C. A. 4th Cir. 1957); *Harrison* v. *Day*, 200 Va. 439, 106 S. E. 2d 636 (1959); *James* v. *Almond*, 170 F. Supp. 331 (D. C. E. D. Va. 1959). PRINCE EDWARD COUNTY: *Davis* v. *School Bd. of Prince Edward Co.*, 347 U. S. 483; 349 U. S. 294; 1 Race Rel. 82 (D. C. E. D. Va. 1955); 142 F. Supp. 616 (D. C. E. D. Va. 1956); 149 F. Supp. 431 (D. C. E. D. Va. 1957); *Allen* v. *School Bd.*, 164 F. Supp. 786 (D. C. E. D. Va. 1958); 249 F. 2d 462 (C. A. 4th Cir. 1957); 266 F. 2d 507 (C. A. 4th Cir. 1959); 6 Race Rel. 432 (D. C. E. D. Va. 1961); 198 F. Supp. 497 (D. C. E. D. Va. 1961); Southern School News, Aug. 1962, p. 1. PULASKI COUNTY: *Crisp* v. *Pulaski Co. School Bd.*, 5 Race Rel. 721 (D. C. W. D. Va. 1960). RICHMOND: *Calloway* v. *Farley*, 2 Race Rel. 1121 (D. C. E. D. Va. 1957);

It is apparent, therefore, that Chapter 33 as construed limits First Amendment freedoms. As this Court said in *Thomas* v. *Collins*, 323 U. S. 516, 537, " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a "labor organizer." He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented. This Court held that the registration requirement as applied to his activities was constitutionally invalid. In the instant case, members of the NAACP urged Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association's legal staff. Like Thomas, the Association and its members were advocating lawful means of vindicating legal rights.

We hold that Chapter 33 as construed violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association. In so holding, we reject two further contentions of respondents. The first is that the Virginia Supreme Court of Appeals has guaranteed free expression by expressly confirming petitioner's right to continue its advocacy of civil-rights litigation. But in light of the whole decree of the court, the guarantee is of purely speculative value. As construed by the Court, Chapter 33, at least potentially, prohibits every

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Warden v. *Richmond School Bd.*, 3 Race Rel. 971 (D. C. E. D. Va. 1958). WARREN COUNTY: *Kilby* v. *County School Bd.*, 3 Race Rel. 972–973 (D. C. W. D. Va. 1958); *County School Bd.* v. *Kilby*, 259 F. 2d 497 (C A. 4th Cir. 1958).

Despite this volume of litigation, only ½ of 1% of Virginia's Negro public school pupils attend school with whites. Southern School News, Sept. 1962, p. 3.

cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. See, *e. g., Near* v. *Minnesota,* 283 U. S. 697; *Shelton* v. *Tucker,* 364 U. S. 479; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293. Cf. *Schneider* v. *Irvington,* 308 U. S. 147, 162. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

C.

The second contention is that Virginia has a subordinating interest in the regulation of the legal profession, embodied in Chapter 33, which justifies limiting petitioner's First Amendment rights. Specifically, Virginia contends that the NAACP's activities in furtherance of litigation, being "improper solicitation" under the state statute, fall within the traditional purview of state regulation of professional conduct. However, the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty,[17] and to outlaw them accordingly, cannot obscure the serious encroachment worked by Chapter 33 upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the

[17] See 4 Blackstone, Commentaries, 134–136. See generally Radin, Maintenance by Champerty, 24 Cal. L. Rev. 48 (1935).

purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. See *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *Konigsberg* v. *State Bar,* 353 U. S. 252. Cf. *In re Sawyer,* 360 U. S. 622. In *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 461, we said, "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." Later, in *Bates* v. *Little Rock,* 361 U. S. 516, 524, we said, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Most recently, in *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, 297, we reaffirmed this principle: ". . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation.[18] And whatever may be or may have been true of suits against

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[18] See, *e. g., Commonwealth* v. *McCulloch,* 15 Mass. 227 (1818); *Brown* v. *Beauchamp,* 5 T. B. Mon. 413 (Ky. 1827); Perkins, Criminal Law, 449–454 (1957); Note, 3 Race Rel. 1257–1259 (1958).

The earliest regulation of solicitation of legal business in England was aimed at the practice whereby holders of claims to land conveyed them to great feudal lords, who used their power or influence to harass the titleholders. See Winfield, The History of Conspiracy and Abuse of Legal Procedure, 152 (1921).

government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest.[19] Hostility still exists to stir-

[19] See Comment: A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. of Chi. L. Rev. 674 (1958). But truly nonpecuniary arrangements involving the solicitation of legal business have been frequently upheld. See *In re Ades*, 6 F. Supp. 467 (D. C. D. Md. 1934) (lawyer's volunteering his services to a litigant, without being asked, held not unprofessional where "important issues" were at stake); *Gunnels* v. *Atlanta Bar Assn.*, 191 Ga. 366, 12 S. E. 2d 602 (1940) (arrangement whereby a local bar association publicly offered to represent, free of charge, persons victimized by usurers, upheld). Of particular pertinence to the instant case is Opinion 148, *supra*, note 13. In the 1930's, a National Lawyers Committee was formed under the auspices of the Liberty League. The Committee proposed (1) to prepare and disseminate through the public media of communications opinions on the constitutionality of state and federal legislation (it appears, particularly New Deal legislation); (2) to offer counsel, without fee or charge, to anyone financially unable to retain counsel who felt that such legislation was violating his constitutional rights. The ABA's Committee on Professional Ethics and Grievances upheld the arrangement. Opinion 148, Opinions of the Committee on Professional Ethics and Grievances, American Bar Association, 308–312 (1957); see Comment, 36 Col. L. Rev. 993.

Also, for example, the American Civil Liberties Union has for many years furnished counsel in many cases in many different parts of the country, without governmental interference. Although this intervention is mostly in the form of *amicus curiae* briefs, occasionally counsel employed by the Union appears directly on behalf of the litigant. See Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale L. J. 574, 576 (1949); ACLU Report on Civil Liberties 1951–1953, pp. 9–10.

ring up private litigation where it promotes the use of legal machinery to oppress: as, for example, to sow discord in a family; [20] to expose infirmities in land titles, as by hunting up claims of adverse possession; [21] to harass large companies through a multiplicity of small claims; [22] or to oppress debtors as by seeking out unsatisfied judgments.[23] For a member of the bar to participate, directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public. And beyond this, for a lawyer to attempt to reap gain by urging another to engage in private litigation has also been condemned: that seems to be the import of Canon 28, which the Virginia Supreme Court of Appeals has adopted as one of its Rules.[24]

Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed

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[20] See Encouraging Divorce Litigation as Ground for Disbarment or Suspension, 9 A. L. R. 1500 (1920); "Heir-hunting" as Ground for Disciplinary Action Against Attorney, 171 A. L. R. 351, 352–355 (1947).

[21] See *Backus* v. *Byron*, 4 Mich. 535, 551–552 (1857).

[22] See *Matter of Clark*, 184 N. Y. 222, 77 N. E. 1 (1906); *Gammons* v. *Johnson*, 76 Minn. 76, 78 N. W. 1035 (1899).

[23] See *Petition of Hubbard*, 267 S. W. 2d 743 (Ky. Ct. App. 1954).

[24] See 171 Va., p. xxix, following the American Bar Association's Canons of Professional Ethics, No. 28: "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. . . . It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes . . . ."

at these activities.[25] We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights.[26] There

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[25] See *People ex rel. Courtney* v. *Asssociation of Real Estate Taxpayers*, 354 Ill. 102, 187 N. E. 823 (1933) (Association to contest constitutionality of tax statutes in which parties and Association attorneys had large sums of money at stake); *In the Matter of Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272 (1936) (motorists' association recommended and paid the fees of lawyers to prosecute or defend claims on behalf of motorist members); see also *People ex rel. Chicago Bar Assn.* v. *Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1 (1935). One aspect of the lay intermediary problem which involved the absence of evidence of palpable control or interference was an arrangement adopted by the Brotherhood of Railroad Trainmen in 1930 under which union members having claims under the Federal Employers' Liability Act were induced to retain lawyers selected by the Brotherhood and to make 25% contingent fee agreements with such lawyers. The arrangement was struck down by several state courts. To the courts which condemned the arrangement it appeared in practical effect to confer a monopoly of FELA legal business upon lawyers chosen by the Brotherhood. These courts also saw it as tending to empower the Brotherhood to exclude lawyers from participation in a lucrative practice, and to cause the loyalties of the union-recommended lawyers to be divided between the union and their clients. *E. g., Hildebrand* v. *State Bar*, 36 Cal. 2d 504, 225 P. 2d 508 (1950); *Doughty* v. *Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379 (1952); *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163 (1958); see Student Symposium, 107 U. of Pa. L. Rev. 387 (1959); 11 Stan. L. Rev. 394 (1959). These decisions have been vigorously criticized. See Traynor, J., dissenting in *Hildebrand, supra;* Drinker, Legal Ethics, 161–167 (1953).

[26] Compare Opinion 148, *supra*, n. 13, 19, at 312 (1957): "The question presented, with its implications, involves problems of political, social and economic character that have long since assumed

has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants; compare *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 459, where we said:

> "[the NAACP] and its members are in every practical sense identical. The Association, which provides in its constitution that '[a]ny person who is in accordance with [its] principles and policies . . .' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views." See also *Harrison* v. *NAACP,* 360 U. S. 167, 177.

Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; [27] the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. There has been neither claim nor

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the proportions of national issues, on one side or the other which multitudes of patriotic citizens have aligned themselves. These issues transcend the range of professional ethics."

[27] Improper competition among lawyers is one of the important considerations relied upon to justify regulations against solicitation. See Note, Advertising, Solicitation and Legal Ethics, 7 Vand. L. Rev. 677, 684 (1954).

proof that any assisted Negro litigants have desired, but have been prevented from retaining, the services of other counsel. We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice. But this would not seem to be the kind of interest or motive which induces criminal conduct.

We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities. *A fortiori,* nothing in this record justifies the breadth and vagueness of the Virginia Supreme Court of Appeals' decree.

A final observation is in order. Because our disposition is rested on the First Amendment as absorbed in the Fourteenth, we do not reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause. That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. See, *e. g., Near* v. *Minnesota,* 283 U. S. 697; *Terminiello* v. *Chicago,* 337 U. S. 1; *Kunz* v. *New York,* 340 U. S. 290. For the Constitution protects ex-

pression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. This Virginia Act is not applied across the board to all groups that use this method of obtaining and managing litigation, but instead reflects a legislative purpose to penalize the N. A. A. C. P. because it promotes desegregation of the races. Our decision in *Brown* v. *Board of Education,* 347 U. S. 483, holding that maintenance of public schools segregated by race violated the Equal Protection Clause of the Fourteenth Amendment, was announced May 17, 1954. The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee* also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N. A. A. C. P. and representing litigants without charge.

The bill, here involved, was one of five that Virginia enacted "as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." Those are the words of Judge Soper, writing for the court in *N. A. A. C. P.* v. *Patty,* 159 F. Supp. 503, 515. He did not indulge in guesswork. He

*Ark. Stat. Ann., 1947 (Cum. Supp. 1961), §§ 41–703 to 41–713; Fla. Stat. Ann., 1944 (Cum. Supp. 1962), §§ 877.01 to 877.02; Ga. Code Ann., 1953 (Cum. Supp. 1961), §§ 26–4701, 26–4703; Miss. Code Ann., 1956, §§ 2049–01 to 2049–08; S. C. Code, 1952 (Cum. Supp. 1960), §§ 56–147 to 56–147.6; Tenn. Code Ann., 1956 (Cum. Supp. 1962), §§ 39–3405 to 39–3410.

reviewed the various steps taken by Virginia to resist our *Brown* decision, starting with the Report of the Gray Commission on November 11, 1955. *Id.*, at 512. He mentioned the "interposition resolution" passed by the General Assembly on February 1, 1956, the constitutional amendment made to carry out the recommendation of the Report of the Gray Commission, and the address of the Governor before the General Assembly that enacted the five laws, including the present one. *Id.*, at 513–515. These are too lengthy to repeat here. But they make clear the purpose of the present law—as clear a purpose to evade our prior decisions as was the legislation in *Lane* v. *Wilson*, 307 U. S. 268, another instance of a discriminatory state law. The fact that the contrivance used is subtle and indirect is not material to the question. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Id.*, at 275. There we looked to the origins of the state law and the setting in which it operated to find its discriminatory nature. It is proper to do the same here.

Discrimination also appears on the face of this Act. The line drawn in § 54–78 is between an organization which has "no pecuniary right or liability" in a judicial proceeding and one that does. As we said in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 459, the N. A. A. C. P. and its members are "in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views." Under the statute those who protect a "pecuniary right or liability" against unconstitutional invasions may indulge in "the solicitation . . . of business for . . . [an] attorney," while those who protect other civil rights may not. This distinction helps make clear the purpose of the legislation, which, as Judge Soper said, was part of the program of "massive resistance" against *Brown* v. *Board of Education, supra.*

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I agree that as construed by the Virginia Supreme Court, Chapter 33 does not proscribe only the actual control of litigation after its commencement, that it does forbid, under threat of criminal punishment, advising the employment of particular attorneys, and that as so construed the statute is unconstitutional.

Nor may the statute be saved simply by saying it prohibits only the "control" of litigation by a lay entity, for it seems to me that upon the record before us the finding of "control" by the Virginia Supreme Court must rest to a great extent upon an inference from the exercise of those very rights which this Court or the Virginia Supreme Court, or both, hold to be constitutionally protected: advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation. Surely it is beyond the power of any State to prevent the exercise of constitutional rights in the name of preventing a lay entity from controlling litigation. Consequently, I concur in the judgment of the Court, but not in all of its opinion.

If we had before us, which we do not, a narrowly drawn statute proscribing only the actual day-to-day management and dictation of the tactics, strategy and conduct of litigation by a lay entity such as the NAACP, the issue would be considerably different, at least for me; for in my opinion neither the practice of law by such an organization nor its management of the litigation of its members or others is constitutionally protected. Both practices are well within the regulatory power of the State. In this regard I agree with my Brother HARLAN.

It is not at all clear to me, however, that the opinion of the majority would not also strike down such a narrowly

drawn statute. To the extent that it would, I am in disagreement. Certainly the NAACP, as I understand its position before this Court, denied that it had managed or controlled the litigation which it had urged its members or others to bring, disclaimed any desire to do so and denied any adverse effects upon its operations if lawyers representing clients in school desegregation or other litigation financed by the NAACP represented only those clients and were under no obligation to follow the dictates of the NAACP in the conduct of that litigation. I would avoid deciding a case not before the Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved. No worse setback could befall the great principles established by *Brown* v. *Board of Education*, 347 U. S. 483, than to give fair-minded persons reason to think otherwise. With all respect, I believe that the striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession.

I.

At the outset the factual premises on which the Virginia Supreme Court of Appeals upheld the application of Chapter 33 to the activities of the NAACP in the area of litigation, as well as the scope of that court's holding, should be delineated.

First, the lawyers who participate in litigation sponsored by petitioner are, almost without exception, members of the legal staff of the NAACP Virginia State Conference. (It is, in fact, against Conference policy to

give financial support to litigation not handled by a staff lawyer.) As such, they are selected by petitioner, are compensated by it for work in litigation (whether or not petitioner is a party thereto), and so long as they remain on the staff, are necessarily subject to its directions. As the Court recognizes, it is incumbent on staff members to agree to abide by NAACP policies.

Second, it is equally clear that the NAACP's directions, or those of its officers and divisions, to staff lawyers cover many subjects relating to the form and substance of litigation. Thus, in 1950, it was resolved at a Board of Directors meeting that:

> "Pleadings in all educational cases—the prayer in the pleading and proof be aimed at obtaining education on a non-segregated basis and that no relief other than that will be acceptable as such.
>
> "Further, that all lawyers operating under such rule will urge their client and the branches of the Association involved to insist on this final relief."

The minutes of the meeting went on to state:

> "Mr. Weber inquired if this meant that the branches would be prohibited from starting equal facility cases and the Special Counsel said it did."

In 1955, a Southwide NAACP Conference issued directions to all NAACP branches outlining the procedure for obtaining desegregation of schools and indicating the point in the procedure at which litigation should be brought and the matter turned over to the "Legal Department." At approximately the same time, the Executive Secretary of the Virginia State Conference issued a directive urging that in view of the possibility of an extended court fight, "discretion and care should be exercised to secure petitioners who will—if need be—go all the way."

A report issued several years later, purporting to give an "up to date picture" of action taken in Virginia by

petitioner stated: "Selection of suit sites reserved for legal staff"; "State legal staff ready for action in selected areas"; and "The majority of our branches are willing to support legal action or any other program leading to early desegregation of schools that may be suggested by the National and State Conference officers."

In short, as these and other materials in the record show, the form of pleading, the type of relief to be requested, and the proper timing of suits have to a considerable extent, if not entirely, been determined by the Conference in coordination with the national office.

Third, contrary to the conclusion of the Federal District Court in the original federal proceeding, *NAACP* v. *Patty,* 159 F. Supp. 503, 508–509, the present record establishes that the petitioner does a great deal more than to advocate litigation and to wait for prospective litigants to come forward. In several instances, especially in litigation touching racial discrimination in public schools, specific directions were given as to the types of prospective plaintiffs to be sought, and staff lawyers brought blank forms to meetings for the purpose of obtaining signatures authorizing the prosecution of litigation in the name of the signer.

Fourth, there is substantial evidence indicating that the normal incidents of the attorney-client relationship were often absent in litigation handled by staff lawyers and financed by petitioner. Forms signed by prospective litigants have on occasion not contained the name of the attorney authorized to act. In many cases, whether or not the form contained specific authorization to that effect, additional counsel have been brought into the action by staff counsel. There were several litigants who testified that at no time did they have any personal dealings with the lawyers handling their cases nor were they aware until long after the event that suits had been filed in their names. This is not to suggest that the petitioner

has been shown to have sought plaintiffs under false pretenses or by inaccurate statements. But there is no basis for concluding that these were isolated incidents, or that petitioner's methods of operation have been such as to render these happenings out of the ordinary.

On these factual premises, amply supported by the evidence, the Virginia Supreme Court of Appeals held that petitioner and those associated with it

> "solicit prospective litigants to authorize the filing of suits by NAACP and Fund [Educational Defense Fund] lawyers, who are paid by the Conference and controlled by NAACP policies . . ." (202 Va., at 159; 116 S. E. 2d, at 68–69),

and concluded that this conduct violated Chapter 33 as well as Canons 35 and 47 of the Canons of Professional Ethics of the American Bar Association, which had been adopted by the Virginia courts more than 20 years ago.

At the same time the Virginia court demonstrated a responsible awareness of two important limitations on the State's power to regulate such conduct. The first of these is the long-standing recognition, incorporated in the Canons, of the different treatment to be accorded to those aiding the indigent in prosecuting or defending against legal proceedings. The second, which coupled with the first led the court to strike down Chapter 36 (*ante*, p. 418), is the constitutional right of any person to express his views, to disseminate those views to others, and to advocate action designed to achieve lawful objectives, which in the present case are also constitutionally due. Mindful of these limitations, the state court construed Chapter 33 not to prohibit petitioner and those associated with it from acquainting colored persons with what it believes to be their rights, or from advising them to assert those rights in legal proceedings, but only from "solicit[ing] legal business for their attorneys or any

particular attorneys." Further, the court determined that Chapter 33 did not preclude petitioner from contributing money to persons to assist them in prosecuting suits, if the suits "have not been solicited by the appellants [the NAACP and Defense Fund] or those associated with them, and channeled by them to their attorneys or any other attorneys."

In my opinion the litigation program of the NAACP, as shown by this record, falls within an area of activity which a State may constitutionally regulate. (Whether it was wise for Virginia to exercise that power in this instance is not, of course, for us to say.) The Court's contrary conclusion rests upon three basic lines of reasoning: (1) that in the context of the racial problem the NAACP's litigating activities are a form of political expression within the protection of the First Amendment, as extended to the States by the Fourteenth; (2) that no sufficiently compelling subordinating state interest has been shown to justify Virginia's particular regulation of these activities; and (3) that in any event Chapter 33 must fall because of vagueness, in that as construed by the state court the line between the permissible and impermissible under the statute is so uncertain as potentially to work a stifling of constitutionally protected rights. Each of these propositions will be considered in turn.

II.

Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. *Thomas* v. *Collins*, 323 U. S. 516; *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516. And just as it includes the right jointly to petition the legislature for redress of grievances, see *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 137–

138, so it must include the right to join together for purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights. This is particularly so in the sensitive area of racial relationships.

But to declare that litigation is a form of conduct that may be associated with political expression does not resolve this case. Neither the First Amendment nor the Fourteenth constitutes an absolute bar to government regulation in the fields of free expression and association. This Court has repeatedly held that certain forms of speech are outside the scope of the protection of those Amendments, and that, in addition, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," are permissible "when they have been found justified by subordinating valid governmental interests." [1] The problem in each such case is to weigh the legitimate interest of the State against the effect of the regulation on individual rights.

An analogy may be drawn between the present case and the rights of workingmen in labor disputes. At the heart of these rights are those of a laborer or a labor representative to speak: to inform the public of his disputes and to urge his fellow workers to join together for mutual aid and protection. So important are these particular rights that absent a clear and present danger of the gravest evil,

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[1] *Konigsberg* v. *State Bar,* 366 U. S. 36, 50–51; and see cases cited therein, including *Cox* v. *New Hampshire,* 312 U. S. 569; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Breard* v. *Alexandria,* 341 U. S. 622; *Roth* v. *United States,* 354 U. S. 476; *Bates* v. *Little Rock,* 361 U. S. 516, 524; *Wilkinson* v. *United States,* 365 U. S. 399.

the State not only is without power to impose a blanket prohibition on their exercise, *Thornhill* v. *Alabama*, 310 U. S. 88, but also may not place any significant obstacle in their path, *Thomas* v. *Collins*, 323 U. S. 516.

But as we move away from speech alone and into the sphere of conduct—even conduct associated with speech or resulting from it—the area of legitimate governmental interest expands. A regulation not directly suppressing speech or peaceable assembly, but having some impact on the form or manner of their exercise will be sustained if the regulation has a reasonable relationship to a proper governmental objective and does not unduly interfere with such individual rights. Thus, although the State may not prohibit all informational picketing, it may prevent mass picketing, *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, and picketing for an unlawful objective, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490. Although it may not prevent advocacy of union membership, it can to some degree inquire into and define the qualifications of those who solicit funds from prospective members or who hold other positions of responsibility.[2] A legislature may not wholly eliminate the right of collective action by workingmen,[3] but it may to a significant extent dictate the form their organization shall take [4] and may limit the demands that the organization may make on employers and others, see, *e. g.*, *International Brotherhood of Electrical Workers* v. *Labor Board*, 341 U. S. 694, 705.

Turning to the present case, I think it evident that the basic rights in issue are those of the petitioner's members

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[2] See *Thomas* v. *Collins*, 323 U. S. 516, 544–545 (concurring opinion); *American Communications Assn.* v. *Douds*, 339 U. S. 382; *De Veau* v. *Braisted*, 363 U. S. 144.

[3] See the discussion in *Hague* v. *C. I. O.*, 307 U. S. 496, 518, 523–525 (opinion of Mr. Justice Stone).

[4] See, *e. g.*, the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. (Supp. III) §§ 401 *et seq.*

to associate, to discuss, and to advocate. Absent the gravest danger to the community, these rights must remain free from frontal attack or suppression, and the state court has recognized this in striking down Chapter 36 and in carefully limiting the impact of Chapter 33. But litigation, whether or not associated with the attempt to vindicate constitutional rights, is *conduct;* it is speech *plus.* Although the State surely may not broadly prohibit individuals with a common interest from joining together to petition a court for redress of their grievances, it is equally certain that the State may impose reasonable regulations limiting the permissible form of litigation and the manner of legal representation within its borders. Thus the State may, without violating protected rights, restrict those undertaking to represent others in legal proceedings to properly qualified practitioners. And it may determine that a corporation or association does not itself have standing to litigate the interests of its shareholders or members—that only individuals with a direct interest of their own may join to press their claims in its courts. Both kinds of regulation are undeniably matters of legitimate concern to the State and their possible impact on the rights of expression and association is far too remote to cause any doubt as to their validity.

So here, the question is whether the particular regulation of conduct concerning litigation has a reasonable relation to the furtherance of a proper state interest, and whether that interest outweighs any foreseeable harm to the furtherance of protected freedoms.

III.

The interest which Virginia has here asserted is that of maintaining high professional standards among those who practice law within its borders. This Court has consistently recognized the broad range of judgments that a State may properly make in regulating any profession.

See, *e. g., Dent* v. *West Virginia,* 129 U. S. 114; *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483. But the regulation of professional standards for members of the bar comes to us with even deeper roots in history and policy, since courts for centuries have possessed disciplinary powers incident to the administration of justice. See *Cohen* v. *Hurley,* 366 U. S. 117, 123–124; *Konigsberg* v. *State Bar,* 366 U. S. 36; *Martin* v. *Walton,* 368 U. S. 25.

The regulation before us has its origins in the long-standing common-law prohibitions of champerty, barratry, and maintenance, the closely related prohibitions in the Canons of Ethics against solicitation and intervention by a lay intermediary, and statutory provisions forbidding the unauthorized practice of law.[5] The Court

[5] See 4 Blackstone, Commentaries, 134–136. Even apart from any state statutory provisions, state judiciaries normally consider themselves free, in the exercise of their supervisory authority over the bar, to enforce these prohibitions derived from the common law. See, *e. g., In re Co-operative Law Co.,* 198 N. Y. 479, 92 N. E. 15; *People ex rel. Courtney* v. *Association of Real Estate Tax-payers,* 354 Ill. 102, 187 N. E. 823; *In re Maclub of America, Inc.,* 295 Mass. 45, 3 N. E. 2d 272, and cases cited therein. Many States, however, also have statutes dealing with these matters. Some merely incorporate the common-law proscriptions of barratry and maintenance. *E. g.,* Del. Code Ann., 1953, Tit. 11, § 371; Mo. Stat. Ann., § 557.470 (Vernon, 1953). Several specifically prohibit the solicitation of legal business for a lawyer by an agent or "runner." *E. g.,* Conn. Gen. Stat., 1958, § 51–87; N. C. Gen. Stat., § 84–38 (1958 Repl. Vol.); Wis. Stat. Ann., § 256.295 (1). About 25 States prohibit the unauthorized practice of law by corporations. American Bar Foundation, Unauthorized Practice Statute Book (1961), 78–90.

Virginia's concern with these problems dates back to the beginning of the Commonwealth. Act of December 8, 1792, 1 Va. Stat. 110 (Shepherd, 1835). Sections 54–74 and 54–78, which as amended are before us today, were originally enacted in 1932, Va. Acts 1932, cc. 129, 284, and the Virginia Supreme Court of Appeals adopted the American Bar Association Canons of Ethics *in haec verba* in 1938. Virginia Canons of Professional Ethics, 171 Va. xviii–xxxv. As in

recognizes this formidable history, but puts it aside in the present case on the grounds that there is here no element of malice or of pecuniary gain, that the interests of the NAACP are not to be regarded as substantially different from those of its members, and that we are said to be dealing here with a matter that transcends mere legal ethics—the securing of federally guaranteed rights. But these distinctions are too facile. They do not account for the full scope of the State's legitimate interest in regulating professional conduct. For although these professional standards may have been born in a desire to curb malice and self-aggrandizement by those who would use clients and the courts for their own pecuniary ends, they have acquired a far broader significance during their long development.

First, with regard to the claimed absence of the pecuniary element, it cannot well be suggested that the attorneys here are donating their services, since they are in fact compensated for their work. Nor can it tenably be argued that petitioner's litigating activities fall into the accepted category of aid to indigent litigants.[6] The reference is presumably to the fact that petitioner itself is a nonprofit organization not motivated by desire for financial gain but by public interest and to the fact that no monetary stakes are involved in the litigation.

But a State's felt need for regulation of professional conduct may reasonably extend beyond mere "ambulance chasing." In *People ex rel. Courtney* v. *Association of*

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many other States, the judiciary of Virginia has declared its inherent authority to assure proper ethical deportment. See, *e. g.*, *Richmond Assn. of Credit Men, Inc.*, v. *Bar Assn.*, 167 Va. 327, 335–336, 189 S. E. 153, 157.

[6] Virginia's policy of promoting aid to indigent suitors is of long standing, see 2 The Papers of Thomas Jefferson (Boyd ed. 1950), 628, and the decision of the state court in this case fully implements that policy.

Real Estate Tax-payers, 354 Ill. 102, 187 N. E. 823, a nonprofit corporation was held in contempt for engaging in the unauthorized practice of law. The Association was formed by citizens desiring to mount an attack on the constitutionality of certain tax rolls. Membership was solicited by the circulation of blank forms authorizing employment of counsel on the applicant's behalf and asking that property be listed for litigation. The attorneys were selected, paid, and controlled by the corporation, which made their services available to the taxpayer members at no cost.[7]

Similarly, several decisions have condemned the provision of counsel for their members by nonprofit automobile clubs, even in instances involving challenges to the validity of a statute or ordinance. *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272; [8] *People ex rel. Chicago Bar Assn.* v. *Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1; see Opinion 8, Opinions of the Committee on Professional Ethics and Grievances, American Bar Assn.

Of particular relevance here is a series of nationwide adjudications culminating in 1958 in *In re Brotherhood of*

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[7] The Court, p. 442, n. 25, *ante*, deals with the *Real Estate Tax-payers* case simply by referring to it as one in which the "parties and Association attorneys had large sums of money at stake." It is true that the attorneys there (as here) were paid for their services by the Association although we are not told the amount of the payment to any attorney. It is also true that the constitutional rights which the members were there seeking to assert through the nonprofit Association were property rights, having monetary value. But I fail to see how these factors can be deemed to create an "element of pecuniary gain" which distinguishes the *Real Estate Tax-payers* case from the present one in any significant respect.

[8] The activities of the Association in this *Maclub* case were more limited than those of the Association in the *Real Estate Tax-payers* case. The attorneys in *Maclub* were selected and retained directly by the members and bills were then submitted to and paid by the Association.

Railroad Trainmen, 13 Ill. 2d 391, 150 N. E. 2d 163. That was a proceeding, remarkably similar to the present one, for a declaratory judgment that the activities of the Brotherhood in assisting with the prosecution of its members' personal injury claims under the Federal Employers' Liability Act [9] were not inconsistent with a state law forbidding lay solicitation of legal business. The court found that each lodge of the Brotherhood appointed a member to file accident reports with the central office, and these reports were sent by the central office to a regional investigator, who, equipped with a contract form for the purpose, would urge the injured member to consult and employ one of the 16 regional attorneys retained by the Brotherhood. The regional counsel offered his services to the injured person on the basis of a contingent fee, the amount of which was fixed by the Brotherhood. The counsel themselves bore the costs of investigation and suit and of operating the Union's legal aid department.

The Union argued that it was not motivated by any desire for profit; that it had an interest commensurate with that of its members in enforcement of the federal statute; and that the advantage taken of injured parties by unscrupulous claims adjustors made it essential to furnish economical recourse to dependable legal assistance. The court ruled against the Union on each of these points. It permitted the organization to maintain an investigative staff, to advise its members regarding their legal rights and to recommend particular attorneys, but it required the Union to stop fixing fees, to sever all financial connections with counsel, and to cease the distribution of contract forms.

The practices of the Brotherhood, similar in so many respects to those engaged in by the petitioner here, have

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[9] 35 Stat. 65 (1908), as amended, 45 U. S. C. §§ 51–60.

been condemned by every state court which has considered them. *Petition of Committee on Rule 28 of the Cleveland Bar Assn.*, 15 Ohio L. Abs. 106; *In re O'Neill*, 5 F. Supp. 465 (D. C. E. D. N. Y.); *Hildebrand* v. *State Bar*, 36 Cal. 2d 504, 225 P. 2d 508; *Doughty* v. *Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379; and see *Atchison, T. & S. F. R. Co.* v. *Jackson*, 235 F. 2d 390, 393 (C. A. 10th Cir.). And for similar opinions on related questions by bar association committees, see Opinion A, Opinions of the Committee on Unauthorized Practice of the Law, American Bar Assn., 36 A. B. A. J. 677; Opinion 773, Committee on Professional Ethics, Assn. of the Bar of the City of New York.

Underlying this impressive array of relevant precedent is the widely shared conviction that avoidance of improper pecuniary gain is not the only relevant factor in determining standards of professional conduct. Running perhaps even deeper is the desire of the profession, of courts, and of legislatures to prevent any interference with the uniquely personal relationship between lawyer and client and to maintain untrammeled by outside influences the responsibility which the lawyer owes to the courts he serves.

When an attorney is employed by an association or corporation to represent individual litigants, two problems arise, whether or not the association is organized for profit and no matter how unimpeachable its motives. The lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyers it employs, is not subject to strict professional discipline as an officer of the court. In addition, the lawyer necessarily finds himself with a divided allegiance—to his employer and to his client—which may prevent full compliance with his basic professional obligations. The matter was well stated, in a different but related context, by the New

York Court of Appeals in *In re Co-operative Law Co.*, 198 N. Y. 479, 483–484, 92 N. E. 15, 16:

> "The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client."

There has, to be sure, been professional criticism of certain applications of these policies.[10] But the continued vitality of the principles involved is beyond dispute,[11] and at this writing it is hazardous at best to predict the direction of the future. For us, however, any such debate is without relevance, since it raises questions of social policy which have not been delegated to this Court for decision. Our responsibility is simply to determine the extent of the State's legitimate interest and to decide whether the course adopted bears a sufficient relation to that interest to fall within the bounds set by the Constitution.

Second, it is claimed that the interests of petitioner and its members are sufficiently identical to eliminate any "serious danger" of "professionally reprehensible conflicts of interest." *Ante,* p. 443. Support for this claim is sought in our procedural holding in *NAACP* v. *Alabama,* 357 U. S.

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[10] See, *e. g.*, Weihofen, "Practice of Law" by Non-Pecuniary Corporations: A Social Utility, 2 U. of Chi. L. Rev. 119; Drinker, Legal Ethics, 161–167; Traynor, J., dissenting in *Hildebrand* v. *State Bar, supra.*

[11] In addition to the decisions discussed in the text, further evidence of the attitude of the bench and bar is found in a survey described in McCracken, Report on Observance by the Bar of Stated Professional Standards, 37 Va. L. Rev. 399, 400–401 (1951).

449, 458–459. But from recognizing, as in that case, that the NAACP has standing to assert the rights of its members when it is a real party in interest, it is plainly too large a jump to conclude that whenever individuals are engaged in litigation involving claims that the organization promotes, there cannot be any significant difference between the interests of the individual and those of the group.

The NAACP may be no more than the sum of the efforts and views infused in it by its members; but the totality of the separate interests of the members and others whose causes the petitioner champions, even in the field of race relations, may far exceed in scope and variety that body's views of policy, as embodied in litigating strategy and tactics. Thus it may be in the interest of the Association in every case to make a frontal attack on segregation, to press for an immediate breaking down of racial barriers, and to sacrifice minor points that may win a given case for the major points that may win other cases too. But in a particular litigation, it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.

Indeed, the potential conflict in the present situation is perhaps greater than those in the union, automobile club, and some of the other cases discussed above, pp. 457–460.

For here, the interests of the NAACP go well beyond the providing of competent counsel for the prosecution or defense of individual claims; they embrace broadly fixed substantive policies that may well often deviate from the immediate, or even long-range, desires of those who choose to accept its offers of legal representations. This serves to underscore the close interdependence between the State's condemnation of solicitation and its prohibition of the unauthorized practice of law by a lay organization.

Third, it is said that the practices involved here must stand on a different footing because the litigation that petitioner supports concerns the vindication of constitutionally guaranteed rights.[12]

But surely state law is still the source of basic regulation of the legal profession, whether an attorney is pressing a federal or a state claim within its borders. See *In re Brotherhood of Railroad Trainmen, supra.* The true question is whether the State has taken action which unreasonably obstructs the assertion of federal rights. Here, it cannot be said that the underlying state policy is inevitably inconsistent with federal interests. The State has sought to prohibit the solicitation and sponsoring of litigation by those who have no standing to initiate that litigation themselves and who are not simply coming to the

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[12] It is interesting to note the Court's reliance on Opinion 148, Opinions of the Committee on Professional Ethics and Grievances, American Bar Assn. This opinion, issued in 1935 at the height of the resentment in certain quarters against the New Deal, approved the practice of the National Lawyers Committee of the Liberty League in publicly offering free legal services (without compensation from any source) to anyone who was *unable to afford* to challenge the constitutionality of legislation which he believed was violating his rights. The opinion may well be debatable as a matter of interpretation of the Canons. But in any event I think it wholly untenable to suggest (as the Court does in its holding today) that a contrary opinion regarding *paid* legal services to *nonindigent* litigants would be unconstitutional.

assistance of indigent litigants. Thus the state policy is not unrelated to the federal rules of standing—the insistence that federal court litigants be confined to those who can demonstrate a pressing personal need for relief. See *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; cf. *Stark* v. *Wickard*, 321 U. S. 288, 304–305, and cases cited therein. This is a requirement of substance as well as form. It recognizes that, although litigation is not something to be avoided at all costs, it should not be resorted to in undue haste, without any effort at extrajudicial resolution, and that those lacking immediate private need may make unnecessary broad attacks based on inadequate records. Nor is the federal interest in impeding precipitate resort to litigation diminished when that litigation concerns constitutional issues; if anything, it is intensified. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86–91.

There remains to be considered on this branch of the argument the question whether this particular exercise of state regulatory power bears a sufficient relation to the established and substantial interest of the State to overcome whatever indirect impact this statute may have on rights of free expression and association.

Chapter 33 as construed does no more than prohibit petitioner and those associated with it from soliciting legal business for its staff attorneys or, under a fair reading of the state court's opinion and amounting to the same thing, for "outside" attorneys who are subject to the Association's control in the handling of litigation which it refers to them. See pp. 466–468, *infra*. Such prohibitions bear a strong and direct relation to the area of legitimate state concern. In matters of policy, involving the form, timing, and substance of litigation, such attorneys are subject to the directions of petitioner and not of those nominally their clients. Further, the methods used to obtain litigants are not conducive to encouraging the kind of attor-

ney-client relationships which the State reasonably may demand. There inheres in these arrangements, then, the potentialities of divided allegiance and diluted responsibility which the State may properly undertake to prevent.

The impact of such a prohibition on the rights of petitioner and its members to free expression and asssociation cannot well be deemed so great as to require that it be struck down in the face of this substantial state interest. The important function of organizations like petitioner in vindicating constitutional rights is not of course to be minimized, but that function is not, in my opinion, substantially impaired by this statute. Of cardinal importance, this regulatory enactment as construed does not in any way suppress assembly, or advocacy of litigation in general or in particular. Moreover, contrary to the majority's suggestion, it does not, in my view, prevent petitioner from recommending the services of attorneys who are not subject to its directions and control. See pp. 460–468, *infra*. And since petitioner may contribute to those who need assistance, the prohibition should not significantly discourage anyone with sufficient interest from pressing his claims in litigation or from joining with others similarly situated to press those claims. It prevents only the solicitation of business for attorneys subject to petitioner's control, and as so limited, should be sustained.

IV.

The Court's remaining line of reasoning is that Chapter 33 as construed (hereafter sometimes simply "the statute") must be struck down on the score of vagueness and ambiguity. I think that this "vagueness" concept has no proper place in this case and only serves to obscure rather than illuminate the true questions presented.

The Court's finding of ambiguity rests on the premise that the statute may prohibit *mere* recommendation of "any particular attorney," whether or not a member of

the NAACP's legal staff or otherwise subject to the Association's direction and control. Proceeding from this premise the Court ends by invalidating the entire statute on the basis that this alleged vagueness too readily lends itself to the stifling of protected activity.

The cardinal difficulty with this argument is that there simply is no real uncertainty in the statute, as the state court found, 202 Va., at 154, 116 S. E. 2d, at 65, or in that court's construction of it. It is true that the concept of vagueness has been used to give "breathing space" to "First Amendment freedoms," see Amsterdam, Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, but it is also true, as that same commentator has well stated, that "[v]agueness is not an extraneous ploy or a judicial *deus ex machina.*" *Id.*, at 88. There is, in other words, "an actual vagueness component in the vagueness decisions." *Ibid.* And the test is whether the law in question has established standards of guilt sufficiently ascertainable that men of common intelligence need not guess at its meaning. *Connally* v. *General Constr. Co.*, 269 U. S. 385; *Winters* v. *New York*, 333 U. S. 507. Laws that have failed to meet this standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms. *E. g., United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 ("unreasonable" charges); *Winters* v. *New York, supra* ("so massed as to become vehicles for inciting"); *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495 ("sacrilegious"). No such language is to be found here.

Ambiguity in the present statute can be made to appear only at the price of strained reading of the state court's opinion. As construed, the statute contains two types of prohibition relating to solicitation. The first prohibits such groups as the NAACP and the Educational Defense Fund, "their officers, members, affiliates, voluntary work-

ers and attorneys" from soliciting legal business for "their attorneys."[13] And the state court made it clear that "their attorneys" referred to "attorneys whom they [the NAACP and the Fund] pay, and who are subject to their directions." 202 Va., at 164, 116 S. E. 2d, at 72. This is the practice with which the state court's opinion is predominantly concerned and which gave rise to the intensive consideration by that court of the relations between petitioner and its legal staff. Surely, there is no element of uncertainty involved in this prohibition. The state court has made it plain that the solicitation involved is not the advocacy of litigation in general or in particular but only that involved in the handling of litigation by petitioner's own paid and controlled staff attorneys. Compare *Thomas* v. *Collins*, 323 U. S. 516.

The second prohibition in the statute is the solicitation by petitioner of legal business for "any particular attorneys" or the channeling of litigation which it supports to "any other attorneys," whether or not they are petitioner's staff attorneys. This language of the state court, coupled primarily with this Court's own notion that Chapter 33 in defining "agents" has departed from common-law principles, leads the majority to conclude that the statute may have been interpreted as precluding organizations such as petitioner from simply advising prospective litigants to engage for themselves particular attorneys, whether members of the organization's legal staff or not.

Surely such an idea cannot be entertained with respect to the state court's discussion of the NAACP and its staff attorneys. The record is barren of all evidence that any litigant, in the type of litigation with which this case is concerned, ever attempted to retain for his own account

[13] As a corollary, attorneys are prohibited, by the law as construed, from accepting employment by petitioner in suits solicited by petitioner.

one of those attorneys, and indeed strongly indicates that such an arrangement would not have been acceptable to the NAACP so long as such a lawyer remained on its legal staff. And the state court's opinion makes it clear that that court was not directing itself to any such situation.

Nor do I think it may reasonably be concluded that the state court meant to preclude the NAACP from recommending "outside" attorneys to prospective litigants, so long as it retained no power of direction over such lawyers. Both in their immediate context and in light of the entire opinion and record below, it seems to me very clear that the phrases "or any particular attorneys" and "or any other attorneys" both have reference only to those "outside" attorneys with respect to whom the NAACP or the Defense Fund bore a relationship equivalent to that existing between them and "their attorneys." [14] It savors almost of disrespect to the Virginia Supreme Court of Appeals, whose opinion manifests full awareness of the considerations that have traditionally marked the line between professional and unprofessional conduct, to read this part of its opinion otherwise. Indeed the ambiguity which this Court now finds quite evidently escaped the notice of both petitioner and its counsel for they did not so much as suggest such an argument in their briefs. Moreover, the kind of approach that the majority takes to the statute is quite inconsistent with the precept that our duty is to construe legislation, if possible, "to save and not to destroy." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30, and cases cited; *United States* v. *Rumely*, 345 U. S. 41, 47.

But even if the statute justly lent itself to the now attributed ambiguity, the Court should excise only the ambiguous part of it, not strike down the enactment in

[14] The full text of those portions of the state court opinion in which these phrases appear is quoted in footnote 9 of the majority opinion, *ante*, p. 426.

its entirety. Our duty to respect state legislation, and to go no further than we must in declining to sustain its validity, has led to a doctrine of separability in constitutional adjudication, always followed except in instances when its effect would be to leave standing a statute that was still uncertain in its potential application.[15] See *Smith* v. *California,* 361 U. S. 147, 151. Given the "ambiguity" view of the Court, the separability doctrine should at least have been applied here, since what would then remain of Chapter 33 could not conceivably be deemed ambiguous.[16] In my view, however, the statute as construed below is not ambiguous at all.

V.

Since the majority has found it unnecessary to consider them, only a few words need be said with respect to petitioner's contentions that Chapter 33 deprives it of property without due process of law and denies it equal protection.

The due process claim is disposed of once it appears that this statute falls within the range of permissible state regulation in pursuance of a legitimate goal. Pp. 455–465, *supra.*

As to equal protection, this position is premised on the claim that the law was directed solely at petitioner's activities on behalf of Negro litigants. But Chapter 33 as it comes to us, with a narrowing construction by the state court that anchors the statute firmly to the common law and to the court's own independently existing supervisory

[15] Of course, if we refuse to sustain one part of a state statute, the state court on remand may decide that the remainder of the statute can no longer stand, but insofar as that conclusion is reached as a matter of state law, it is of no concern to us.

[16] Cf. *Stromberg* v. *California,* 283 U. S. 359, in which the state law condemned the displaying of a red flag for any of three purposes and this Court sustained the validity of the law as to two of these purposes but struck it down for vagueness as to the third.

powers over the Virginia legal profession, leaves no room for any finding of discriminatory purpose. Petitioner is merely one of a variety of organizations that may come within the scope of the long-standing prohibitions against solicitation and unauthorized practice. It would of course be open to the petitioner, if the facts should warrant, to claim that Chapter 33 was being enforced discriminatorily as to it and not against others similarly circumstanced. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374. But the present record is barren of any evidence suggesting such unequal application, and we may not presume that it will occur. *Lieberman* v. *Van de Carr*, 199 U. S. 552, 562–563; *Douglas* v. *Noble*, 261 U. S. 165, 170.[17]

I would affirm.

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[17] It has been suggested that the state law may contain an invidious discrimination because it treats those organizations that have a pecuniary interest in litigation (for example, an insurance company) differently from those that do not. But surely it cannot be said that this distinction, which is so closely related to traditional concepts of privity, lacks any rational basis. The importance of the existence of a pecuniary interest in determining the propriety of sponsoring litigation has long been recognized at common law, both in England, see *Findon* v. *Parker*, 11 M. & W. 675, 152 Eng. Rep. 976 (Exch. 1843), and in the United States, see, *e. g.*, *Dorwin* v. *Smith*, 35 Vt. 69; *Vaughan* v. *Marable*, 64 Ala. 60, 66–67; *Smith* v. *Hartsell*, 150 N. C. 71, 63 S. E. 172. The distinction drawn by the Virginia law is not without parallel in the requirement that in the absence of a statute or rule a suit in a federal court attacking the validity of a law may be brought only by one who is in immediate danger of sustaining some direct and substantial injury as the result of its enforcement, and not by one who merely "suffers in some indefinite way in common with people generally," or even in common with members of the same race or class. *Massachusetts* v. *Mellon*, 262 U. S. 447, 487–488. See *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162. And of course the motives of the Virginia legislators in enacting Chapter 33 are beyond the purview of this Court's responsibilities. *Fletcher* v. *Peck*, 6 Cranch 87, 130; see *Arizona* v. *California*, 283 U. S. 423, 455; cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 377.

Syllabus.

WONG SUN ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 36. Argued March 29 and April 2, 1962.—Restored to calendar for reargument June 4, 1962.—Reargued October 8, 1962.—Decided January 14, 1963.

In a trial in a Federal District Court without a jury, petitioners were convicted of fraudulent and knowing transportation and concealment of illegally imported heroin, in violation of 21 U. S. C. § 174. Although the Court of Appeals held that the arrests of both petitioners without warrants were illegal, because not based on "probable cause" within the meaning of the Fourth Amendment nor "reasonable grounds" within the meaning of the Narcotics Control Act of 1956, it affirmed their convictions, notwithstanding the admission in evidence over their timely objections of (1) statements made orally by petitioner Toy in his bedroom at the time of his arrest; (2) heroin surrendered to the agents by a third party as a result of those statements; and (3) unsigned statements made by each petitioner several days after his arrest, and after being lawfully arraigned and released on his own recognizance. The Court of Appeals held that these items were not the fruits of the illegal arrests, and, therefore, were properly admitted in evidence. *Held:*

1. On the record in this case, there was neither reasonable grounds nor probable cause for Toy's arrest, since the information upon which it was based was too vague and came from too untested a source to accept it as probable cause for the issuance of an arrest warrant; and this defect was not cured by the fact that Toy fled when a supposed customer at his door early in the morning revealed that he was a narcotics agent. Pp. 479–484.

2. On the record in this case, the statements made by Toy in his bedroom at the time of his unlawful arrest were the fruits of the agents' unlawful action, and they should have been excluded from evidence. Pp. 484–487.

3. The narcotics taken from a third party as a result of statements made by Toy at the time of his arrest were likewise fruits of the unlawful arrest, and they should not have been admitted as evidence against Toy. Pp. 487–488.

4. After exclusion of the foregoing items of improperly admitted evidence, the only proofs remaining to sustain Toy's conviction are his and his codefendant's unsigned statements; any admissions of guilt in Toy's statement require corroboration; no reference to Toy in his codefendant's statement constitutes admissible evidence corroborating any admission by Toy; and Toy's conviction must be set aside for lack of competent evidence to support it. Pp. 488–491.

5. In view of the fact that, after his unlawful arrest, petitioner Wong Sun had been lawfully arraigned and released on his own recognizance and had returned voluntarily several days later when he made his unsigned statement, the connection between his unlawful arrest and the making of that statement was so attenuated that the unsigned statement was not the fruit of the unlawful arrest and, therefore, it was properly admitted in evidence. P. 491.

6. The seizure of the narcotics admitted in evidence invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial. Pp. 491–492.

7. Any references to Wong Sun in his codefendant's statement were incompetent to corroborate Wong Sun's admissions, and Wong Sun is entitled to a new trial, because it is not clear from the record whether or not the trial court relied upon his codefendant's statement as a source of corroboration of Wong Sun's confession. Pp. 492–493.

288 F. 2d 366, reversed and cause remanded.

Edward Bennett Williams, acting under appointment by the Court, 368 U. S. 973, reargued the cause and filed a supplemental brief for petitioners. *Sol A. Abrams* also filed a brief for petitioners.

J. William Doolittle reargued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop.*

Mr. Justice Brennan delivered the opinion of the Court.

The petitioners were tried without a jury in the District Court for the Northern District of California under a two-count indictment for violation of the Federal Narcotics

Laws, 21 U. S. C. § 174.[1] They were acquitted under the first count which charged a conspiracy, but convicted under the second count which charged the substantive offense of fraudulent and knowing transportation and concealment of illegally imported heroin. The Court of Appeals for the Ninth Circuit, one judge dissenting, affirmed the convictions. 288 F. 2d 366. We granted certiorari. 368 U. S. 817. We heard argument in the 1961 Term and reargument this Term. 370 U. S. 908.

About 2 a. m. on the morning of June 4, 1959, federal narcotics agents in San Francisco, after having had one Hom Way under surveillance for six weeks, arrested him and found heroin in his possession. Hom Way, who had not before been an informant, stated after his arrest that he had bought an ounce of heroin the night before from one known to him only as "Blackie Toy," proprietor of a laundry on Leavenworth Street.

About 6 a. m. that morning six or seven federal agents went to a laundry at 1733 Leavenworth Street. The sign

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[1] 21 U. S. C. § 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

above the door of this establishment said "Oye's Laundry." It was operated by the petitioner James Wah Toy. There is, however, nothing in the record which identifies James Wah Toy and "Blackie Toy" as the same person. The other federal officers remained nearby out of sight while Agent Alton Wong, who was of Chinese ancestry, rang the bell. When petitioner Toy appeared and opened the door, Agent Wong told him that he was calling for laundry and dry cleaning. Toy replied that he didn't open until 8 o'clock and told the agent to come back at that time. Toy started to close the door. Agent Wong thereupon took his badge from his pocket and said, "I am a federal narcotics agent." Toy immediately "slammed the door and started running" down the hallway through the laundry to his living quarters at the back where his wife and child were sleeping in a bedroom. Agent Wong and the other federal officers broke open the door and followed Toy down the hallway to the living quarters and into the bedroom. Toy reached into a nightstand drawer. Agent Wong thereupon drew his pistol, pulled Toy's hand out of the drawer, placed him under arrest and handcuffed him. There was nothing in the drawer and a search of the premises uncovered no narcotics.

One of the agents said to Toy ". . . [Hom Way] says he got narcotics from you." Toy responded, "No, I haven't been selling any narcotics at all. However, I do know somebody who has." When asked who that was, Toy said, "I only know him as Johnny. I don't know his last name." However, Toy described a house on Eleventh Avenue where he said Johnny lived; he also described a bedroom in the house where he said "Johnny kept about a piece" [2] of heroin, and where he and Johnny had smoked some of the drug the night before. The agents

[2] A "piece" is approximately one ounce.

left immediately for Eleventh Avenue and located the house. They entered and found one Johnny Yee in the bedroom. After a discussion with the agents, Yee took from a bureau drawer several tubes containing in all just less than one ounce of heroin, and surrendered them. Within the hour Yee and Toy were taken to the Office of the Bureau of Narcotics. Yee there stated that the heroin had been brought to him some four days earlier by petitioner Toy and another Chinese known to him only as "Sea Dog."

Toy was questioned as to the identity of "Sea Dog" and said that "Sea Dog" was Wong Sun. Some agents, including Agent Alton Wong, took Toy to Wong Sun's neighborhood where Toy pointed out a multifamily dwelling where he said Wong Sun lived. Agent Wong rang a downstairs door bell and a buzzer sounded, opening the door. The officer identified himself as a narcotics agent to a woman on the landing and asked "for Mr. Wong." The woman was the wife of petitioner Wong Sun. She said that Wong Sun was "in the back room sleeping." Alton Wong and some six other officers climbed the stairs and entered the apartment. One of the officers went into the back room and brought petitioner Wong Sun from the bedroom in handcuffs. A thorough search of the apartment followed, but no narcotics were discovered.

Petitioner Toy and Johnny Yee were arraigned before a United States Commissioner on June 4 on a complaint charging a violation of 21 U. S. C. § 174. Later that day, each was released on his own recognizance. Petitioner Wong Sun was arraigned on a similar complaint filed the next day and was also released on his own recognizance.[3]

[3] The Record of the arraignment proceedings recites that arrest warrants were issued, on the arraignment dates, for the arrest of both petitioners and Yee. It was conceded in the trial court, however,

Within a few days, both petitioners and Yee were interrogated at the office of the Narcotics Bureau by Agent William Wong, also of Chinese ancestry.[4] The agent advised each of the three of his right to withhold information which might be used against him, and stated to each that he was entitled to the advice of counsel, though it does not appear that any attorney was present during the questioning of any of the three. The officer also explained to each that no promises or offers of immunity or leniency were being or could be made.

The agent interrogated each of the three separately. After each had been interrogated the agent prepared a statement in English from rough notes. The agent read petitioner Toy's statement to him in English and interpreted certain portions of it for him in Chinese. Toy also read the statement in English aloud to the agent, said there were corrections to be made, and made the corrections in his own hand. Toy would not sign the statement, however; in the agent's words "he wanted to know first if the other persons involved in the case had signed theirs." Wong Sun had considerable difficulty understanding the

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that no arrest warrants were outstanding at the time of the actual arrests on June 4.

The Record also states that bond was initially fixed for each of the petitioners and for Yee in the amount of $5,000, on the recommendation of the United States Attorney. Later on the respective arraignment days, again on motion of the United States Attorney, it was ordered that each of the three be released on his own recognizance.

[4] Because neither statement was ever signed, the blanks in which the dates were to have been inserted were never filled in. The heading of Toy's statement suggests that it was made on June 5, although Agent William Wong at the trial suggested he had only talked informally with Toy on that date, the formal statement not being made until June 9. The agent also testified that Wong Sun's statement was made June 9, although a rubber-stamp date beneath the agent's own signature at the foot of the statement reads, "June 15, 1959."

statement in English and the agent restated its substance in Chinese. Wong Sun refused to sign the statement although he admitted the accuracy of its contents.[5]

Hom Way did not testify at petitioners' trial. The Government offered Johnny Yee as its principal witness but excused him after he invoked the privilege against self-incrimination and flatly repudiated the statement he had given to Agent William Wong. That statement was not offered in evidence nor was any testimony elicited from him identifying either petitioner as the source of the heroin in his possession, or otherwise tending to support the charges against the petitioners.

The statute expressly provides that proof of the accused's possession of the drug will support a conviction under the statute unless the accused satisfactorily explains the possession. The Government's evidence tending to prove the petitioners' possession (the petitioners offered no exculpatory testimony) consisted of four items which the trial court admitted over timely objections that they were inadmissible as "fruits" of unlawful arrests or of attendant searches: (1) the statements made orally by petitioner Toy in his bedroom at the time of his arrest; (2) the heroin surrendered to the agents by Johnny Yee; (3) petitioner Toy's pretrial unsigned statement; and (4) petitioner Wong Sun's similar statement. The dispute below and here has centered around the correctness of the rulings of the trial judge allowing these items in evidence.

The Court of Appeals held that the arrests of both petitioners were illegal because not based on " 'probable cause' within the meaning of the Fourth Amendment" nor "reasonable grounds" within the meaning of the Narcotic

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[5] The full texts of both statements are set forth in an Appendix to this opinion.

Control Act of 1956.[6] The court said as to Toy's arrest, "There is no showing in this case that the agent knew Hom Way to be reliable," and, furthermore, found "nothing in the circumstances occurring at Toy's premises that would provide sufficient justification for his arrest without a warrant." 288 F. 2d, at 369, 370. As to Wong Sun's arrest, the Court said "there is no showing that Johnnie Yee was a reliable informer." The Court of Appeals nevertheless held that the four items of proof were not the "fruits" of the illegal arrests and that they were therefore properly admitted in evidence.

The Court of Appeals rejected two additional contentions of the petitioners. The first was that there was insufficient evidence to corroborate the petitioners' unsigned admissions of possession of narcotics. The court held that the narcotics in evidence surrendered by Johnny Yee, together with Toy's statements in his bedroom at the time of arrest corroborated petitioners' admissions. The second contention was that the confessions were

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[6] 26 U. S. C. § 7607:

"The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U. S. C., sec. 1401 (1)), may—

"(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The terms "probable cause" for purposes of the Fourth Amendment and "reasonable grounds" as used in the statute, mean substantially the same. *Draper* v. *United States*, 358 U. S. 307, 310, n. 3; *United States* v. *Walker*, 246 F. 2d 519, 526.

inadmissible because they were not signed. The Court of Appeals held on this point that the petitioners were not prejudiced, since the agent might properly have testified to the substance of the conversations which produced the statements.

We believe that significant differences between the cases of the two petitioners require separate discussion of each. We shall first consider the case of petitioner Toy.

I.

The Court of Appeals found there was neither reasonable grounds nor probable cause for Toy's arrest. Giving due weight to that finding, we think it is amply justified by the facts clearly shown on this record. It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see *Henry* v. *United States,* 361 U. S. 98, 101, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would "warrant a man of reasonable caution in the belief" that a felony has been committed, *Carroll* v. *United States,* 267 U. S. 132, 162—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice." [7] *Brinegar* v. *United States,* 338 U. S. 160, 176.

Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now

[7] See *Giordenello* v. *United States,* 357 U. S. 480, 485–487; *Johnson* v. *United States,* 333 U. S. 10, 16–17. See generally Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 673, 695–701 (1924).

existing for the procurement of arrest warrants would be destroyed.[8] The threshold question in this case, therefore, is whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of Toy. We think that no warrant would have issued on evidence then available.

The narcotics agents had no basis in experience for confidence in the reliability of Hom Way's information; he had never before given information. And yet they acted upon his imprecise suggestion that a person described only as "Blackie Toy," the proprietor of a laundry somewhere on Leavenworth Street, had sold one ounce of heroin. We have held that identification of the suspect by a reliable informant may constitute probable cause for arrest where the information given is sufficiently accurate to lead the officers directly to the suspect. *Draper* v. *United States*, 358 U. S. 307. That rule does not, however, fit this case. For aught that the record discloses, Hom Way's accusation merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one "Blackie Toy's" laundry—and whether by chance or other

[8] Our discussion implies no view whether a search warrant should be obtained where a search is conducted incident to a valid arrest, cf. *United States* v. *Rabinowitz*, 339 U. S. 56, for nothing in this case turns on the presence or absence of a search warrant. Since the officers had obtained an arrest warrant in *Rabinowitz*, the question before us here was not there presented. As to the question before us, see *Wrightson* v. *United States*, 222 F. 2d 556, 559–560:

"But, if officers can arrest without a warrant and never be required to disclose the facts upon which they based their belief of probable cause—if, in other words, they have an untouchable power to arrest without a warrant,—why would they ever bother to get a warrant? And the same obvious conclusion follows if the courts, when an arrest is attacked as illegal, will assume, without facts, that an arrest without a warrant was for probable cause. To strike down all factual requirements in respect to probable cause for arrests without a warrant, while maintaining them for the issuance of a warrant, would be to blast one of the support columns of justice by law."

means (the record does not say) they came upon petitioner Toy's laundry, which bore not his name over the door, but the unrevealing label "Oye's." Not the slightest intimation appears on the record, or was made on oral argument, to suggest that the agents had information giving them reason to equate "Blackie" Toy and James Wah Toy—*e. g.*, that they had the criminal record of a Toy, or that they had consulted some other kind of official record or list, or had some information of some kind which had narrowed the scope of their search to this particular Toy.

It is conceded that the officers made no attempt to obtain a warrant for Toy's arrest. The simple fact is that on the sparse information at the officers' command, no arrest warrant could have issued consistently with Rules 3 and 4 of the Federal Rules of Criminal Procedure. *Giordenello* v. *United States,* 357 U. S. 480, 486.[9] The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be inter-

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[9] We noted in *Giordenello* that Rules 3 and 4 of the Federal Rules of Criminal Procedure provide that an arrest warrant shall issue only upon a sworn complaint setting forth "the essential facts constituting the offense charged," and showing "that there is probable cause to believe that an offense has been committed and that the defendant has committed it . . . ." The Fourth Amendment, from which the requirements of the Rules derive, provides that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* . . . the persons or things to be seized." (Emphasis added.) The requirement applies both to arrest and search warrants. A description of a suspect merely as "Blackie Toy," operator of a laundry somewhere on Leavenworth Street, hardly is information "particularly describing . . . the person . . . to be seized." Such information is no better than the wholesale or "dragnet" search warrant, which we have condemned. See, *e. g., Marron* v. *United States,* 275 U. S. 192, 196; see generally Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 480–482 (1961).

posed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Cf. *Jones* v. *United States,* 362 U. S. 257, 270. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy.

The Government contends, however, that any defects in the information which somehow took the officers to petitioner Toy's laundry were remedied by events which occurred after they arrived. Specifically, it is urged that Toy's flight down the hall when the supposed customer at the door revealed that he was a narcotics agent adequately corroborates the suspicion generated by Hom Way's accusation. Our holding in *Miller* v. *United States,* 357 U. S. 301, is relevant here, and exposes the fallacy of this contention. We noted in that case that the lawfulness of an officer's entry to arrest without a warrant "must be tested by criteria identical with those embodied in 18 U. S. C. § 3109, which deals with entry to execute a search warrant." 357 U. S., at 306. That statute requires that an officer must state his authority and his purpose at the threshold, and be refused admittance, before he may break open the door. We held that when an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight from the door must be regarded as ambiguous conduct. We expressly reserved the question "whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances." 357 U. S., at 309. In the instant case, Toy's flight from the door afforded no surer an inference of guilty knowledge than did the suspect's conduct in the *Miller* case. Agent Wong did eventually disclose that he was a narcotics officer. However, he affirmatively misrepresented his mission at the

outset, by stating that he had come for laundry and dry cleaning. And before Toy fled, the officer never adequately dispelled the misimpression engendered by his own ruse. Cf. *Gouled* v. *United States*, 255 U. S. 298; *Gatewood* v. *United States*, 209 F. 2d 789.

Moreover, he made no effort at that time, nor indeed at any time thereafter, to ascertain whether the man at the door was the "Blackie Toy" named by Hom Way. Therefore, this is not the case we hypothesized in *Miller* where "without an express announcement of purpose, the facts known to officers would justify them in being virtually certain" that the person at the door knows their purpose. 357 U. S., at 310. Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion.[10] Here, as in *Miller*,

[10] Although the question presented here is only whether the petitioner's flight justified an inference of guilt sufficient to generate probable cause for his arrest, and not whether his flight would serve to corroborate proof of his guilt at trial, the two questions are inescapably related. Thus it is relevant to the present case that we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In *Alberty* v. *United States*, 162 U. S. 499, 511, this Court said:

". . . it is not universally true that a man, who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'"

See also *Hickory* v. *United States*, 160 U. S. 408; *Allen* v. *United States*, 164 U. S. 492; *Starr* v. *United States*, 164 U. S. 627; and for the views of two Courts of Appeals see *Vick* v. *United States*, 216 F. 2d 228, 233 (C. A. 5th Cir.) ("One motive is about as likely as another. Appellant may be guilty, but his conviction cannot rest upon mere conjecture and suspicion"); cf. *Cooper* v. *United States*,

the Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence, or the need to rescue a victim in peril—see 357 U. S., at 309—which excused the officer's failure truthfully to state his mission before he broke in.

A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked. Cf. *Henry* v. *United States,* 361 U. S. 98, 104. That result would have the same essential vice as a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up. *Byars* v. *United States,* 273 U. S. 28; *United States* v. *Di Re,* 332 U. S. 581, 595. Thus we conclude that the Court of Appeals' finding that the officers' uninvited entry into Toy's living quarters was unlawful and that the bedroom arrest which followed was likewise unlawful, was fully justified on the evidence. It remains to be seen what consequences flow from this conclusion.

II.

It is conceded that Toy's declarations in his bedroom are to be excluded if they are held to be "fruits" of the agents' unlawful action.

In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd* v. *United States,* 116 U. S. 616, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks* v. *United States,* 232 U. S. 383. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. *Silverthorne Lumber Co.* v. *United States,* 251

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218 F. 2d 39, 41 (C. A. D. C. Cir.) ("After all, innocent people caught in a web of circumstances frequently become terror-stricken"). But cf. *United States* v. *Heitner,* 149 F. 2d 105 (C. A. 2d Cir.).

U. S. 385. Mr. Justice Holmes, speaking for the Court in that case, in holding that the Government might not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed, expressed succinctly the policy of the broad exclusionary rule:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." 251 U. S., at 392.

The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman* v. *United States,* 365 U. S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis* v. *United States,* 227 F. 2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.[11] See

[11] See Kamisar, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, 1961 U. of Ill. Law Forum 78, 84–96. But compare Maguire, Evidence of Guilt (1959), 187–190.

Nueslein v. *District of Columbia*, 115 F. 2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea* v. *United States*, 350 U. S. 214, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins* v. *United States*, 364 U. S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.

The Government argues that Toy's statements to the officers in his bedroom, although closely consequent upon the invasion which we hold unlawful, were nevertheless admissible because they resulted from "an intervening independent act of a free will." This contention, however, takes insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion.[12]

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[12] See Lord Devlin's comment: "It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." Devlin, The Criminal Prosecution in England (1958), 32. Even in the absence of such oppressive circumstances, and where an exclusionary rule rests principally on nonconstitutional grounds, we have sometimes refused to differentiate between voluntary and involuntary declarations. See Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1, 26–27 (1958). For illustrative situations where a voluntary act of the accused has been held insufficient to cure the otherwise unlawful acquisition of evidence, see *Bynum* v. *United States*, 262 F. 2d 465 (holding inadmissible fingerprints made by defendant after unlawful

The Government also contends that Toy's declarations should be admissible because they were ostensibly exculpatory rather than incriminating. There are two answers to this argument. First, the statements soon turned out to be incriminating, for they led directly to the evidence which implicated Toy. Second, when circumstances are shown such as those which induced these declarations, it is immaterial whether the declarations be termed "exculpatory." [13] Thus we find no substantial reason to omit Toy's declarations from the protection of the exclusionary rule.

III.

We now consider whether the exclusion of Toy's declarations requires also the exclusion of the narcotics taken from Yee, to which those declarations led the police. The prosecutor candidly told the trial court that "we wouldn't have found those drugs except that Mr. Toy helped us to." Hence this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence "from an independent source," *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392; nor is this a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint." *Nardone* v. *United States,* 308 U. S. 338, 341. We need not hold that all evi-

arrest); *United States* v. *Watson,* 189 F. Supp. 776 (excluding narcotics voluntarily surrendered by accused in the course of an unauthorized search). The Ninth Circuit Court of Appeals from which the instant case comes has recognized in an analogous context, that "all declarations and statements under the compulsion of the things so seized, are affected by the vice of primary illegality. . . ." *Takahashi* v. *United States,* 143 F. 2d 118, 122.

[13] Moreover, we held in *Opper* v. *United States,* 348 U. S. 84, 92, that even where exculpatory statements are voluntary and thus clearly admissible, they require at least the degree of corroboration required of incriminating statements.

dence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959). We think it clear that the narcotics were "come at by the exploitation of that illegality" and hence that they may not be used against Toy.

IV.

It remains only to consider Toy's unsigned statement. We need not decide whether, in light of the fact that Toy was free on his own recognizance when he made the statement, that statement was a fruit of the illegal arrest. Cf. *United States* v. *Bayer,* 331 U. S. 532. Since we have concluded that his declarations in the bedroom and the narcotics surrendered by Yee should not have been admitted in evidence against him, the only proofs remaining to sustain his conviction are his and Wong Sun's unsigned statements. Without scrutinizing the contents of Toy's ambiguous recitals, we conclude that no reference to Toy in Wong Sun's statement constitutes admissible evidence corroborating any admission by Toy. We arrive at this conclusion upon two clear lines of decisions which converge to require it. One line of our decisions establishes that criminal confessions and admissions of guilt require extrinsic corroboration; the other line of precedents holds that an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime.

It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or

confession of the accused.[14] We observed in *Smith* v. *United States*, 348 U. S. 147, 153, that the requirement of corroboration is rooted in "a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused." In *Opper* v. *United States*, 348 U. S. 84, 89–90, we elaborated the reasons for the requirement:

> "In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination."

It is true that in *Smith* v. *United States, supra*, we held that although "corroboration is necessary for all elements of the offense established by admissions alone," extrinsic proof was sufficient which "merely fortifies the truth of the confession, without independently establishing the crime charged . . . ." 348 U. S., at 156.[15]

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[14] For the history and development of the corroboration requirement, see 7 Wigmore, Evidence (3d ed. 1940), §§ 2070–2071; Note, Proof of the Corpus Delicti Aliunde the Defendant's Confession, 103 U. of Pa. L. Rev. 638–649 (1955). For the present scope and application of the rule, see 2 Underhill, Criminal Evidence (5th ed. 1956), §§ 402–403. For a comprehensive collection of cases, see Annot., 45 A. L. R. 2d 1316 (1956).

[15] Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of the death of the supposed victim. See 7 Wigmore, Evidence (3d ed. 1940), § 2072, n. 5. There need in such a case be no link,

However, Wong Sun's unsigned confession does not furnish competent corroborative evidence. The second governing principle, likewise well settled in our decisions, is that an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime. While such a statement is "admissible against the others where it is in furtherance of the criminal undertaking . . . all such responsibility is at an end when the conspiracy ends." *Fiswick* v. *United States,* 329 U. S. 211, 217. We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking.[16] See *Krulewitch* v. *United States,* 336 U. S. 440, 443–445. And where postconspiracy declarations have been admitted, we have carefully ascertained that limiting instructions kept the jury from considering the contents with respect to the guilt of anyone but the declarant. *Lutwak* v. *United States,* 344 U. S. 604, 618–619; *Delli Paoli* v. *United States,* 352 U. S. 232, 236–237. We have never ruled squarely on the question presented here, whether a codefendant's statement might serve to corroborate even where it will not suffice to convict.[17] We see

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outside the confession, between the injury and the accused who admits having inflicted it. But where the crime involves no tangible *corpus delicti,* we have said that "the corroborative evidence must implicate the accused in order to show that a crime has been committed." 348 U. S., at 154. Finally, we have said that one uncorroborated admission by the accused does not, standing alone, corroborate an unverified confession. *United States* v. *Calderon,* 348 U. S. 160, 165.

[16] See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 922, 989–990 (1959).

[17] Cf. Williams, The Proof of Guilt (1958), 135: "Even where . . . the evidence of an accomplice becomes admissible against his fellows, it remains suspect evidence, because of the tainted source from which it comes. The accomplice may no longer have anything to fear or

no warrant for a different result so long as the rule which regulates the use of out-of-court statements is one of admissibility, rather than simply of weight, of the evidence. The import of our previous holdings is that a co-conspirator's hearsay statements may be admitted against the accused for no purpose whatever, unless made during and in furtherance of the conspiracy. Thus as to Toy the only possible source of corroboration is removed and his conviction must be set aside for lack of competent evidence to support it.

V.

We turn now to the case of the other petitioner, Wong Sun. We have no occasion to disagree with the finding of the Court of Appeals that his arrest, also, was without probable cause or reasonable grounds. At all events no evidentiary consequences turn upon that question. For Wong Sun's unsigned confession was not the fruit of that arrest, and was therefore properly admitted at trial. On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint." *Nardone* v. *United States,* 308 U. S. 338, 341. The fact that the statement was unsigned, whatever bearing this may have upon its weight and credibility, does not render it inadmissible; Wong Sun understood and adopted its substance, though he could not comprehend the English words. The petitioner has never suggested any impropriety in the interrogation itself which would require the exclusion of this statement.

We must then consider the admissibility of the narcotics surrendered by Yee. Our holding, *supra,* that this

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hope from the way in which he gives his evidence; yet he may mistakenly entertain such a fear or hope, or he may wish by his evidence against others to gratify some spite against them."

ounce of heroin was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial. Cf. *Goldstein* v. *United States*, 316 U. S. 114.[18]

However, for the reasons that Wong Sun's statement was incompetent to corroborate Toy's admissions contained in Toy's own statement, any references to Wong Sun in Toy's statement were incompetent to corroborate Wong Sun's admissions. Thus, the only competent source of corroboration for Wong Sun's statement was the heroin itself. We cannot be certain, however, on this state of the record, that the trial judge may not also have considered the contents of Toy's statement as a source of corroboration. Petitioners raised as one ground of objection to the introduction of the statements the claim that each statement, "even if it were a purported admission or confession or declaration against interest of a defendant . . . would not be binding upon the other defendant." The trial judge, in allowing the statements in, apparently overruled all of petitioners' objections, including this one. Thus we presume that he considered all portions of both statements as bearing upon the guilt of both petitioners.

We intimate no view one way or the other as to whether the trial judge might have found in the narcotics alone sufficient evidence to corroborate Wong Sun's admissions

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[18] This case is not like *Jones* v. *United States*, 362 U. S. 257, where the person challenging the seizure of evidence was lawfully on the premises at the time of the search. Nor is it like *Chapman* v. *United States*, 365 U. S. 610, where we held that a landlord could not lawfully consent to a search of his tenant's premises. See generally Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 N. W. U. L. Rev. 471 (1952).

that he delivered heroin to Yee and smoked heroin at Yee's house around the date in question. But because he might, as the factfinder, have found insufficient corroboration from the narcotics alone, we cannot be sure that the scales were not tipped in favor of conviction by reliance upon the inadmissible Toy statement. This is particularly important because of the nature of the offense involved here.

Surely, under the narcotics statute, the discovery of heroin raises a presumption that someone—generally the possessor—violated the law. As to him, once possession alone is proved, the other elements of the offense—transportation and concealment with knowledge of the illegal importation of the drug—need not be separately demonstrated, much less corroborated. 21 U. S. C. § 174. Thus particular care ought to be taken in this area, when the crucial element of the accused's possession is proved solely by his own admissions, that the requisite corroboration be found among the evidence which is properly before the trier of facts. We therefore hold that petitioner Wong Sun is also entitled to a new trial.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

[For concurring opinion of MR. JUSTICE DOUGLAS, see *post*, p. 497.]

[For dissenting opinion of MR. JUSTICE CLARK, see *post*, p. 498.]

APPENDIX TO OPINION OF THE COURT.

Statement of JAMES WAH TOY taken on June 5, 1959, concerning his knowledge of WONG SUN's narcotic trafficking

I have known WONG SUN for about 3 months. I know him as SEA DOG which is what everyone calls him.

I first met him in Marysville, California, during a Chinese holiday. I drove him back to San Francisco on that occasion. Sometimes he asks me to drive him home and to different places in San Francisco.

Sometime during April or May of this year, he asked me to drive him out to JOHNNY YEE's house, at 11th and Balboa Streets. He asked me to call JOHNNY and tell him we were coming. When we got there we went into the house and WONG SUN took a paper package out of his pocket and put it on the table. Then both WONG SUN and JOHNNY YEE opened the package. I don't know how much heroin was in it, but I know it was more than 10 spoons. I asked them if I could have some for myself and they said yes. I took a little bit and went across the room and smoked it in a cigarette.

WONG SUN and JOHNNY YEE talked for about 10 or 15 minutes, but they were talking in low tones so that I could not hear what they were saying. I didn't see any money change hands, because I wasn't paying too much attention. WONG SUN and I then left the house and drove. I drove WONG SUN to his home and he gave me $15.00. He said the money was for driving him out there.

I have driven WONG SUN out to JOHNNY YEE's house about 5 times altogether. Each time WONG SUN gave me $10 or $15 for doing it and also, Johnny gave me a little heroin—enough to put in 3 or 4 cigarettes. The last time I drove WONG SUN out to YEE's house was last Tuesday, May 26, 1959. On Wednesday night June 3, 1959, at about 10:00 p. m., I called JOHNNY YEE and told him that "I'm coming out pretty soon—I don't have anything." He said okay, so I drove out there. When I got there I went in the house and Johnny gave me a paper of heroin. The bindle had about enough for 5 or 6 cigarettes. I didn't give him any money and he didn't ask for any. He gives it to me just out of friendship. He has given me heroin like this quite a few times. I don't remember how many times. I have known HOM WEI

about 2 or 3 years but I have never dealt in narcotics with him. I have known ED FONG about 1 year and I have never dealt in narcotics with him, either. I have heard people that I know in the Hop Sing Tong Club talk about HOM WEI dealing in narcotics but nothing about ED FONG. I do not know JOHN MOW LIM or BILL FONG. The only connection I have now is JOHNNY YEE.

I have carefully read the foregoing statement, which was made of my own free will, without promise of reward or immunity and not under duress. I have been given ample opportunity to make corrections have initialed or signed each page as evidence thereof and hereby state that this statement is true to the best of my knowledge and belief.

_____

JAMES WAH TOY

. . . . .

JAMES WAH TOY did not wish to sign this statement at this time. He stated he may change his mind at a later date. However, I read this statement to him and in addition he read it also and stated that the contents thereof were true to the best of his knowledge. Corrections made were by JAMES WAH TOY without his initials.

/s/ WILLIAM WONG
William Wong, Narcotic Agent

STATEMENT OF WONG SUN

I met JAMES TOY approximately the middle of March, this year, at Marysville, California, during a Chinese celebration. We returned to San Francisco together and we discussed the possible sale of heroin. I told JAMES that I could get a piece of heroin for $450 from a person known as BILL.

Shortly after returning to San Francisco, JAMES told me he wanted me to get a piece. I asked him who it was

for and he told me it was for JOHNNY. He gave me $450 and I obtained a piece of heroin from BILL. I did this on approximately 8 occasions, however, at least one of these times the heroin was not for JOHNNY—for another friend of JAMES TOY. JOHNNY would pay JAMES $600 for each piece.

On several occasions after I had obtained the piece for JAMES I would drive with him to JOHNNY's house, 606 11th Avenue, and we would go upstairs to the bedroom. There, all three of us would smoke some of the heroin and JAMES would give the piece to JOHNNY. I also went with JAMES on approximately 3 other occasions when he did not take any heroin and then we smoked at JOHNNY's and we would also get some for our own use.

About 4 days before I was arrested (arrested on June 4, 1959) JAMES called me at home about 7 o'clock in the evening and told me to come by. I went to the laundry and JAMES told me to get a piece. I called BILL and arranged to meet him. JAMES gave me $450 which I gave to BILL when I met him. BILL called me about one hour later at the laundry and I met him. He gave me one piece, which I gave to JAMES, and JAMES immediately thereafter called JOHNNY. We drove to 606—11th Ave. at approximately midnight and JAMES gave the piece to JOHNNY. It was contained in a rubber contraceptive in a small brown paper bag.

Again on June 3rd, the night before I was arrested, I met JAMES at the laundry, prior to 11 o'clock in the evening, and JAMES telephoned JOHNNY at EV—6–9336. Then we went out to JOHNNY's and smoked heroin and also had one paper for our own use later. We were there approximately ½ hour and then left.

The laundry mentioned is OYE's LAUNDRY, 1733 Leavenworth Street, which is run by JAMES TOY. I do not know JOHNNY's last name and know him only

through JAMES TOY. As well as the few times at JOHNNY's home, I have seen JOHNNY on a number of occasions at the laundry.

I have carefully read the foregoing statement, consisting of 2 pages which was made of my own free will, without promise of reward or immunity and not under duress. I have been given ample opportunity to make corrections, have initialed or signed each page as evidence thereof and hereby state that that this statement is true to the best of my knowledge and belief.

WONG SUN

. . . . .

WONG SUN, being unable to read English, did not sign this statement. However, I read this statement to him and he stated that the contents thereof were true to the best of his knowledge.

/s/ WILLIAM WONG
William Wong, Narcotic Agent

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion I do so because nothing the Court holds is inconsistent with my belief that there having been time to get a warrant, probable cause alone could not have justified the arrest of petitioner Toy without a warrant.

I adhere to the views I expressed in *Jones* v. *United States*, 362 U. S. 257, 273. What I said in the *Jones* case had been earlier stated by Mr. Justice Jackson, writing for the Court in *Johnson* v. *United States*, 333 U. S. 10 (another narcotics case):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its pro-

tection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." Pp. 13–14. And see *Chapman* v. *United States,* 365 U. S. 610, 615–616.

The Court finds it unnecessary to reach that constitutional question. I mention it only to reiterate that the *Johnson* case represents the law and is in no way eroded by what we fail to decide today.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The Court has made a Chinese puzzle out of this simple case involving four participants: Hom Way, Blackie Toy, Johnny Yee and "Sea Dog" Sun. In setting aside the convictions of Toy and Sun it has dashed to pieces the heretofore recognized standards of probable cause necessary to secure an arrest warrant or to make an arrest without one. Instead of dealing with probable cause as involving "probabilities," "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Brinegar* v. *United States,* 338 U. S. 160, 175 (1949), the Court sets up rigid, mechanical standards, applying the 20–20 vision of hindsight in an area where the ambiguity and immediacy inherent in unexpected arrest are present. While probable cause must be based on more than mere suspicion, *Henry* v. *United States,* 361 U. S. 98, 104 (1959), it does

not require proof sufficient to establish guilt. *Draper* v. *United States,* 358 U. S. 307, 312 (1959). The sole requirement heretofore has been that the knowledge in the hands of the officers at the time of arrest must support a "man of reasonable caution in the belief" that the subject had committed narcotic offenses. *Carroll* v. *United States,* 267 U. S. 132, 162 (1925). That decision is faced initially not in the courtroom but at the scene of arrest where the totality of the circumstances facing the officer is weighed against his split-second decision to make the arrest. This is an everyday occurrence facing law enforcement officers, and the unrealistic, enlarged standards announced here place an unnecessarily heavy hand upon them. I therefore dissent.

I.

The first character in this affair is Hom Way, who was arrested in possession of narcotics and told the officers early that morning that he had purchased an ounce of heroin on the previous night from Blackie Toy, who operated a laundry on Leavenworth Street. Narcotics agents, armed with this information from a person they had known for six weeks and who was under arrest for possession of narcotics, immediately sought out Blackie Toy, the second character. The laundry was located without difficulty (as far as the record shows) from the information furnished by Hom Way. The Court gratuitously reads into the record its supposition that Hom Way "merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one 'Blackie Toy's' laundry . . . ." On the contrary, the identification of "Blackie" and the directions to his laundry were sufficiently accurate for the officers—two of whom were of Chinese ancestry—to find Blackie at his laundry within an hour. I cannot say in the face of this record that this was a "roaming" per-

formance up and down Leavenworth Street. To me it was efficient police work by officers familiar with San Francisco and the habits and practices of its Chinese-American inhabitants. Indeed, the information was much more explicit than that approved by this Court in *Draper* v. *United States, supra.*

There are other indicia of reliability, however. Here the informer, believed by the officers to be reliable,* was under arrest when he implicated himself in the purchase of an ounce of heroin the previous night. Since he was in possession of narcotics and his information related to a narcotics sale in which he was the buyer, the officers had good reason to rely on Hom Way's knowledge. See *Rodgers* v. *United States,* 267 F. 2d 79 (C. A. 9th Cir. 1959), and *Thomas* v. *United States,* 281 F. 2d 132 (C. A. 8th Cir.), cert. denied, 364 U. S. 904 (1960). As to his credibility, he was confronted with prosecution for possession of narcotics and well knew that any discrepancies in his story might go hard with him. Furthermore, the statement was a declaration against interest which stripped Hom Way of any explanation for his possession of narcotics and made certain the presumption of 21 U. S. C. § 174. I do not see what stronger and more reliable information one could have to establish probable cause for the arrest without warrant of Blackie Toy.

But even assuming there was no probable cause at this point, the Government produced additional evidence to support the lawfulness of Blackie's arrest. In broad daylight, about 6:30 on the same morning that Hom Way was arrested, one of the officers of Chinese ancestry, Agent Alton Wong, knocked on Blackie Toy's laundry door. When Wong told him that he wanted laundry, Blackie

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*One of the officers testified at the trial that he had known Hom Way for six weeks. In response to the question whether Hom Way was a reliable informer, the officer replied, "I believe so, yes, sir."

opened the door and advised him to return at 8 a. m. Wong testified that he then "pulled out [his] badge" and announced that he was a narcotics agent. Blackie slammed the door in Wong's face and ran down the hall of the laundry. Wong broke through the door after him—calling again that he was "a narcotics Treasury agent." Only when Blackie reached the family bedroom was Wong able to arrest him, as he reached into a night-stand drawer, apparently looking for narcotics. Agent Wong immediately confronted him with Hom Way's accusation that Blackie Toy had sold him narcotics. Blackie denied selling narcotics, but he did not deny knowing Hom Way and later admitted knowing him. There is no basis in *Miller* v. *United States,* 357 U. S. 301 (1958), for the Court's conclusion that Blackie's flight "signified . . . a natural desire [by Toy] to repel an apparently unauthorized intrusion. . . ." As I see it this is incredible in the light of the record. Nor is there any support in the record that "before Toy fled, the officer never adequately dispelled the misimpression engendered by his own ruse." On the contrary the officer's showing of his badge and announcement that he was a narcotics agent immediately put Blackie in flight behind the slamming door. To conclude otherwise takes all prizes as a *non sequitur.* As he pursued, Wong continued to identify himself as a narcotics agent. I ask, how could he more clearly announce himself and his purpose?

This Court has often held unexplained flight—as here—from an officer to be strong evidence of guilt. *E. g., Husty* v. *United States,* 282 U. S. 694 (1931); *Brinegar* v. *United States, supra,* at p. 166, n. 7; see *Henry* v. *United States, supra,* where the Court was careful to distinguish its facts from those of "fleeing men or men acting furtively." 361 U. S., at 103. Moreover, as the Government has always emphasized, this is particularly true in narcotics cases where delay may have serious consequences, *i. e.,* the hid-

ing or destruction of the drugs. This Court noted without disapproval in *Miller* v. *United States, supra,* the state decisions holding that "justification for noncompliance [with the rule] exists in exigent circumstances, as, for example, when the officers may in good faith believe . . . that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox,* 46 Cal. 2d 301, 294 P. 2d 6." 357 U. S., at 309. And the Court continued, "It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. Cf. *People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 798, 802 (1924)." *Id.,* at 310.

The Court places entire reliance on the decision in *Miller.* I submit that it is inapposite. That case involved interpretation of the law of the District of Columbia. *Id.,* at 306. The arrest was at night, and the door was broken in just as the defendant began to close it. Thus there was no flight but only what the officers believed to be an attempt to bar their entrance. The only identification given by the officers occurred before the defendant opened the door, when "in a low voice" through the closed door they answered the defendant's query as to who was there by saying, "Police." *Id.,* at 303. The facts in *Miller* differ significantly from this case both in the clarity of identification by the officers and in the character and extent of the defendant's conduct. For that reason, the conclusions that Blackie's flight is evidence to support probable cause and that the officers gave sufficient notice to permit lawful entry are supported rather than weakened by the Court's decision in *Miller.*

The information from Hom Way and Blackie Toy's unexplained flight cannot be viewed "in two separate, logic-tight compartments. . . . [T]ogether they composed

a picture meaningful to a trained, experienced observer." *Christensen* v. *United States,* 104 U. S. App. D. C. 35, 36, 259 F. 2d 192, 193 (1958). I submit that the officers as reasonable men properly concluded that the petitioner was the "Blackie Toy" who Hom Way informed them had committed a felony and that his immediate arrest—as he ran through his hall—was lawful and was imperative in order to prevent his escape. In view of this there is no "poisonous tree" whose fruits we must evaluate, and Blackie's declaration at the time of the arrest and the narcotics found in Yee's possession are admissible in evidence. The trial court found that evidence sufficiently corroborative of Toy's confession, and the Court of Appeals affirmed. For the same reasons discussed, *infra,* as to Wong Sun, I see no occasion to overturn these consistent findings of two courts.

II.

As to "Sea Dog," Wong Sun, there is no disagreement that his confession and the narcotics found in Yee's possession were admissible in evidence against him. The question remains as to whether there was sufficient independent evidence to corroborate the confession. Such evidence "does not have to prove the offense beyond a reasonable doubt, or even by a preponderance . . . ." *Smith* v. *United States,* 348 U. S. 147, 156 (1954). The requirement is satisfied "if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged . . . ." *Ibid.;* see also *Opper* v. *United States,* 348 U. S. 84 (1954). Wong Sun's confession stated in part that about four days before his arrest he and Toy delivered an ounce of heroin to Yee and that on the night before his arrest—the night of June 3, 1959—he and Toy smoked some heroin at Yee's house. On June 4, 1959, the officers found at Yee's residence quantities of heroin totaling "just less than one ounce." In light

of this evidence, I am unable to say that the trial court and the Court of Appeals erred in holding that Wong Sun's confession was sufficiently corroborated.

The Court does not reach a contrary conclusion as to corroboration, but it grants Wong Sun a new trial on the ground that the trial court "may" also "have considered the contents of Toy's statement as a source of corroboration" of it. This point was not raised as a question here nor was it discussed in the briefs. Despite this the Court goes to some lengths to develop a chain of inferences in finding prejudicial error. This might be plausible where the case was tried to a jury, as were all the cases cited by the Court. Indeed, I find no case where such presumption of error was applied, as here, to a trial before a judge. The Court admits that the heroin found in Johnny Yee's possession might itself be sufficient corroboration, but it reverses on the excuse that the judge "may" have considered Toy's confession as well. I see no reason for this assumption where a federal judge is the trier of the fact, and I would therefore affirm the judgment as to both petitioners.

FEDERAL TRADE COMMISSION *v.* SUN OIL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 56. Argued November 15, 1962.—Decided January 14, 1963.

Respondent, a refiner-supplier of its own branded gasoline, was charged with price discrimination in violation of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, when it granted a reduction in price to one of its independently owned retail station customers, but not to others of its similarly owned station customers who were located nearby and who were shown to have been competitively harmed by the discriminatory reduction. The allowance to the favored station was given in order to enable it to meet the price reductions of a competing service station owned and operated by a retail chain selling a different brand of gasoline. *Held:* Respondent is not entitled under § 2 (b) of the Act to the defense that its discriminatory lower price was given "in good faith to meet the equally low price of a competitor," since the competing station is not a "competitor" of respondent within the meaning of § 2 (b), which contemplates that a seller may meet the lower price of its own, and not its customer's, competitor. Pp. 506–529.

294 F. 2d 465, reversed.

Robert B. Hummel argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, J. William Doolittle, Elliott H. Moyer* and *James McI. Henderson.*

Leonard J. Emmerglick argued the cause for respondent. With him on the brief were *Ellis Lyons, George Alexander, Henry A. Frye* and *Richard L. Freeman.*

Briefs of *amici curiae,* urging affirmance, were filed by *Milton Handler* for Texaco Inc. and by *Otis H. Ellis* for National Oil Jobbers Council, Inc.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case grows out of a gasoline "price war" in Jacksonville, Florida. The question presented is whether a refiner-supplier of gasoline charged with the granting of a price discrimination in violation of § 2 (a) of the Clayton Act,[1] as amended by the Robinson-Patman Act, has available to it, under § 2 (b) of the Act,[2] the defense that the discriminatory lower price was given "in good faith to meet an equally low price of a competitor," when the gasoline refiner-supplier shows that it gave the discriminatory price to only one of a number of its independently owned retail station customers in a particular region in order to enable that station to meet price reductions of a competing service station owned and operated by a retail chain selling a different brand of gasoline.

The Federal Trade Commission held the § 2 (b) defense to be unavailable under such circumstances. 55 F. T. C. 955. The Court of Appeals for the Fifth Circuit reversed, 294 F. 2d 465, and this Court granted certiorari, 368 U. S. 984, to review this difficult and important question concerning the scope and application of the § 2 (b) defense.

I.

The relevant facts are not seriously disputed.

Respondent, Sun Oil Company ("Sun"), is a New Jersey corporation and a major integrated refiner and distributor of petroleum products, including gasoline. At the time of the alleged violation here in issue, Sun marketed in 18 States a single grade of gasoline sold under the trade name "Sunoco." Sun does not ordinarily sell directly to the motorist, but usually distributes its gasoline and other related products to the consuming public

[1] 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13 (a).

[2] 49 Stat. 1526, 15 U. S. C. § 13 (b).

through retail service station operators who lease their stations from it.[3]

In 1955, Gilbert McLean was the lessee and operator of a Sunoco gas station located on the corner of 19th and Pearl Streets in Jacksonville, Florida. He was one of Sun's 38 retail dealers in the Jacksonville area, which Sun divided into three sales territories; McLean operated in a sales territory composed of eight Sun stations, one of which was only about 11 blocks away from McLean. Like almost all retail sellers of branded gasoline, McLean bought and sold only the petroleum products of a single supplier, here Sun. Notwithstanding, he was, as found below, and conceded here, an independent contractor and bore the direct and immediate risk of profitability of the station.

Commencing operation of the station in February 1955, McLean bought gasoline from Sun at 24.1 cents per gallon and resold it at 28.9 cents per gallon to the motoring public; the other Sun dealers in Jacksonville purchased from Sun at the same price and obtained the same 4.8-cent-per-gallon margin of gross profit.

In June 1955, about four months after McLean began business, the Super Test Oil Company, which operated about 65 retail service stations, opened a Super Test station diagonally across the street from McLean and began selling its "regular" grade of gasoline at 26.9 cents per gallon. It appears that this was Super Test's first and only station in Jacksonville. The record does not disclose that Super Test was anything more than a retail dealer;

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[3] In 1956, Sun had a total of approximately 6,980 domestic dealers. In 1954, the year preceding the alleged violation, Sun was the thirteenth largest of the integrated oil companies. H. R. Rep. No. 1423, 84th Cong., 1st Sess. 23. Among United States industrial corporations of all types, it ranked forty-fourth in assets, thirty-sixth in net profits, and thirty-eighth in sales. S. Rep. No. 2810, 84th Cong., 2d Sess. 7.

nor does it indicate the source from which Super Test obtained its gasoline.

The two-cent-per-gallon difference in price between McLean and Super Test represented the "normal" price differential then prevailing in the area between "major" and "non-major" brands of gasoline. This "normal" differential represents the price spread which can obtain between the two types of gasoline without major competitive repercussions. Thus, McLean was apparently not adversely affected to any substantial degree by this first-posted price of Super Test.

Thereafter, however, Super Test sporadically reduced its price at its Jacksonville station, usually on weekends. Some of the price cuts were advertised in the local newspaper and all were posted on curbside signs. For example, on August 27, 1955, the Super Test station reduced its price to 21.9 cents a gallon and on the following day to 20.9 cents per gallon. While these lower prices were normally short-lived, at least one was maintained for a week. On the occasion of each price reduction by the Super Test station, McLean's sales of Sunoco declined substantially.

When Super Test began lowering its price below the normal two-cent differential, McLean, who was maintaining his price of 28.9 cents per gallon, from time to time protested to Sun and sought relief in the form of a price concession from it. For about four months, Sun took no action, but in December 1955, after further periodic price reductions by Super Test and a complaint by McLean that he would be forced out of business absent help from Sun, Sun told McLean that it would come to his aid in the event of further price cuts. When, on December 27, 1955, Super Test dropped its price for "regular" gasoline to 24.9 cents per gallon, McLean told Sun that he would have to post a price of 25.9 cents in order to meet the competition. On the same day, Sun gave McLean a price allowance or discount of 1.7 cents per gallon. McLean accord-

ingly dropped his retail price three cents per gallon, from 28.9 cents to 25.9 cents, thus reducing his gross margin from the prior 4.8 cents per gallon to 3.5 cents per gallon, the amount regarded by Sun as the minimum gross margin which should be earned by its retail dealers. In lowering his price to within one cent of Super Test's, McLean absorbed 1.3 cents and Sun 1.7 cents of the per gallon price reduction. No corresponding price reduction was given by Sun to any of its other dealers in the area.

Within a few days, Super Test further lowered its price to 23.9 cents per gallon. No further price cuts were made by either McLean or Super Test until mid-February 1956, when Super Test cut its price for "regular" gasoline to 22.9 cents per gallon. At about the same time, a general price war developed in the Jacksonville area and several other suppliers made price reductions. Sun then dropped its price equally to all of its dealers in the area. Notwithstanding a remarkable increase in his gallon sales after the December 27, 1955, price allowance to him and the reduction in his own resale price, McLean went out of business on February 18, 1956, two days after the outbreak of the general price war.[4] The exact reason for the failure of McLean's business does not appear; it is not clear that it was because of the price war.

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[4] During the period from July through November 1955, McLean's monthly sales in gallons varied from a high of about 7,400 (July) to a low of approximately 5,900 (November). McLean cut his price on December 27, 1955; his December sales were 8,300 gallons. His sales in January 1956 jumped to over 32,000 gallons and continued at about the same rate into February until he discontinued business.

In July 1955, the month following its opening, Super Test sold just over 5,000 gallons of "regular" gasoline at its Jacksonville station; its monthly sales of "regular" thereafter varied from about 10,700 gallons (September) to slightly under 19,000 (December). In January and February 1956, Super Test's sales of regular exceeded 61,000 and 67,000 gallons, respectively.

During the period between the December 27, 1955, price reduction by McLean and the February 1956 date on which Sun extended its discount to all of its area dealers, a number of Sun dealers located at distances varying from less than a mile (about 11 blocks) to about three and one-half miles from McLean's station suffered substantial declines in sales of Sunoco gasoline. Some of these Sun dealers who testified below said that they saw former customers of theirs buying gas from McLean and two declared that their customers had told them that they switched to McLean because of his lower price. Some of these dealers complained to Sun about the favored treatment accorded McLean and, prior to the February general price reductions, unsuccessfully sought compensating discounts from Sun for themselves. Though three of these other Sun dealers ultimately went out of business, there is no indication that they did so as a result of the December price reduction to McLean.

In September 1956 the Federal Trade Commission filed a complaint against Sun charging it with illegal price discrimination in violation of § 2 (a) of the Clayton Act, as amended, and with entry into a price-fixing agreement with McLean in violation of § 5 of the Federal Trade Commission Act.[5] The Commission adopted the findings, conclusions and proposed order of the trial examiner and affirmed his initial determination that Sun had violated the provisions of both Acts, as charged. The Commission also found that there had been actual competitive injury to the nonfavored Sun dealers by virtue of Sun's discriminatory December 27 price allowance to McLean and rejected Sun's asserted defense under § 2 (b) of the Clayton Act because Sun was not meeting its own competition, that is a price cut by another wholesale seller, and because the allowance to McLean "was not made to meet a lower

[5] 38 Stat. 719, as amended by 52 Stat. 111, 15 U. S. C. § 45.

price made to [McLean] . . . by another supplier" but "to meet the competition of the Super-Test station across the street."

Considering Super Test to be an integrated supplier-retailer of gasoline, the Court of Appeals reversed, reasoning: first, that McLean was but a "conduit" for the marketing of Sun's products and therefore Sun, as a practical matter, was really competing with Super Test for sales of its gasoline; and second, that the price competition of Super Test was as much a threat to the continued existence of McLean as a customer of Sun as a direct competing lower offer to McLean would have been and it was not realistic to expect such an offer to be made to McLean. The Court of Appeals concluded that Sun was entitled, under the circumstances, to "assert the [§ 2 (b)] defense of meeting competition in good faith." 294 F. 2d, at 481. The Court of Appeals did not overturn the Commission's finding that Sun's discriminatory price concession to McLean had resulted in competitive injury to the other Sun dealers in McLean's area.

The Commission petitioned for a writ of certiorari to review the Court of Appeals holding that the § 2 (b) defense was available to Sun under the circumstances of this record; no review was sought of the Court of Appeals reversal of the Commission's findings that Sun had entered a price-fixing agreement illegal under § 5 of the Federal Trade Commission Act and that Sun's purpose in granting the lower price to McLean was to undercut, not meet, the price of Super Test.

The only issue thus before the Court is whether Sun is here entitled to avail itself of the § 2 (b) defense that its December 27 "lower price" to McLean was extended "in good faith to meet an equally low price of a competitor." If the defense is unavailable, there is no issue as to violation of § 2 (a) of the Clayton Act; respondent Sun does not dispute that the requisite elements of a price

discrimination otherwise illegal under § 2 (a) have been shown.

As indicated, the Court of Appeals assumed, as have a number of commentators on the case,[6] that Super Test was an integrated supplier-retailer of gasoline. The record does not support this conclusion, however, and therefore, as the case comes to us, availability of the § 2 (b) defense to Sun is determined on the assumption that Super Test was engaged solely in retail operations; similarly, since there is in the record no evidence as to Super Test's source of supply or the price at which it bought gasoline, we assume that Super Test was not the beneficiary of any enabling price cut from its own supplier.[7]

The precise question presented has not heretofore been resolved by this Court. The only reported judicial decision (other than that of the Court of Appeals in this case) considering the issue is a District Court opinion supporting the view of the Commission. *Enterprise Industries, Inc.*, v. *Texas Co.*, 136 F. Supp. 420, reversed on other grounds, 240 F. 2d 457, cert. denied, 353 U. S. 965. The Commission itself has in the past taken a view contrary to the one urged here, but since 1956 has been maintaining its present position.

II.

The context in which the conflicting contentions of both the Commission and respondent Sun must first be considered is that framed by the language of the statute itself. Section 2 (a) of the Clayton Act, as amended by the Rob-

[6] See, *e. g.*, Note, 62 Col. L. Rev. 171 (1962); Note, 1962 Duke L. J. 300; Note, 75 Harv. L. Rev. 429 (1961).

[7] Were it otherwise, *i. e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion.

inson-Patman Act, makes it unlawful for "any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." [8] Of course applicability of the statute depends upon the requisite involvement in interstate commerce. As has been noted, there is no challenge here to the finding that Sun's actions were within the prohibitions of § 2 (a); the discrimination was found to have the statutorily requisite anticompetitive effects.

Section 2 (b) of the Act contains a proviso permitting a seller to rebut a *prima facie* case of discrimination in violation of § 2 (a) by "showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." [9] This proviso is usually referred to

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[8] Section 2 (a) provides in more extensive part:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

[9] Section 2 (b) provides in full text:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or

as the "good faith meeting competition" defense. The seller has the burden of bringing himself within the exculpating provision of § 2 (b), which has been interpreted to afford an absolute defense to a charge of violating § 2 (a), notwithstanding the existence of the statutorily prohibited anticompetitive effect, *Standard Oil Co.* v. *Federal Trade Comm'n,* 340 U. S. 231.

Reading the words to have "their normal and customary meaning," *Schwegmann Bros.* v. *Calvert Corp.,* 341 U. S. 384, 388, the § 2 (b) phrase "equally low price of a competitor" would seem to refer to the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut. (In this case, this would mean a competitor of Sun, the refiner-supplier, and not a competitor of McLean, the retail dealer.) Were something more intended by Congress, we would have expected a more explicit recitation as, for example, is the case in § 2(a) in which the intent to give broader scope was expressly effected by the prohibition of price discriminations which, *inter alia,* adversely affected competition not only with the seller (in this case Sun) who grants the favored price, but with the knowing recipient thereof (in this case McLean) and "with customers of either of them." Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory

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facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

price, it is reasonable to conclude that like clarity of expression would be present in § 2 (b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary.

The fact that § 2 (b) permits a seller to meet the competitor's "equally low" price is similarly suggestive of an interpretation which limits application of the proviso to situations in which the seller's reduction in price is made in response to a price cut by its own competitor rather than by a competitor of its customer. Linguistically and practically, it makes but little sense to talk, for example, of a wholesaler's meeting of the "equally low" price of one of his purchaser's retail competitors. The reduced retail price of the purchaser's competitor will almost invariably be higher than the supplier's wholesale price; even in those instances in which this is not so, it cannot seriously be suggested that under § 2 (b) the wholesaler is entitled to reduce discriminatorily his wholesale price to the lower retail level. Such a result is not only economically unrealistic, but strains normal language use. Moreover, it is difficult to see what appropriately cognizable competitive interest Congress might be thought to have been serving in enacting a statute productive of such an anomalous result.

Recognizing the incongruity of such an interpretation, and having no need to go quite so far, respondent argues merely that as a wholesaler it is protected under § 2 (b) when it lowers its own price sufficiently to allow its retail dealer, in turn, to reduce his retail price to meet a com-

petitive retail offer. But this too extends the statute beyond its immediately apparent meaning; the language of the section contains no implication that it comprehends a two-stage price reduction effected by two separate economic units at different levels of distribution as the measure of setting the "equally low" price.[10]

Enough has been said to demonstrate that a reading in context of the § 2 (b) proviso to give its words their normal and usual meaning strongly suggests, though it does not inexorably compel, an interpretation of the defense contrary to that urged by respondent. Moreover, the narrower interpretation of the statute is consonant with overall rationality and broader statutory consistency and purpose, and effects a result compatible with legislative history and economic reality. We now turn to consideration of such other factors.

III.

Prior to passage of the 1936 Robinson-Patman Act, § 2 of the Clayton Act prohibited price discriminations and allowed as one defense a demonstration that the price concession was "made in good faith to meet competition." 38 Stat. 730. Because of Congress' growing concern that this exemption was overly broad and did not sufficiently inhibit business concentration thought to be fostered in substantial part by unwarranted price favoritism shown by suppliers to large buyers, particularly large retail chains then threatening smaller local merchants, the Robinson-Patman Act was passed to strengthen the Clayton Act prohibitions on price discrimination. See, *e. g.*, H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3–6; Rowe, Price Discrimination Under the Robinson-Patman Act (1962), pp. 3–24. Not only was § 2 (a) amended to eliminate cer-

[10] A reading of § 2 (b) such as Sun contends for would also make it difficult, if not impossible, to read sensibly the section's reference to the "services or facilities" of a competitor.

tain asserted weaknesses, but the § 2 (b) proviso legitimatizing discriminations made to "meet competition" was limited to protect only discriminations made "to meet an equally low price of a competitor."

The House Committee, in its report on the bill, said of the newly worded § 2 (b) proviso:

> "This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until *his competitor* has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16. (Emphasis supplied.)

While such language in the congressional materials suggests the reading limiting § 2 (b) to the meeting of the seller's own competition, it is, of course, not conclusive since not directed to the specific problem here presented. Neither the briefs nor the arguments of the parties nor of the *amici* have pointed to any more explicit congressional guide to resolution of the precise question before us. No more can be said than that there appears to be nothing in the legislative history to directly contradict what we deem to be the ordinary meaning of the statutory language or to indicate that a different reading was specifically intended; what few guides there are support the interpretation we here adopt.

IV.

We thus turn to the fundamental purposes of the Robinson-Patman Act and the antitrust laws in general for guidance more impressive than that found in the recited legislative history.

Relying on the general purpose of the Act to protect the small independent businessman, respondent Sun argues that the statutory policy supports its price-cutting action, even though discriminatory, because that action was designed to protect and preserve a small independent businessman, McLean. It is asserted that the limited resources available to McLean bar his survival in a gasoline price war of any duration. McLean's small margin of profit, his relative inability to lower his retail price because a direct function of the price he pays his supplier, here Sun, and other factors make his continued independent existence in a present-day price war wholly dependent upon receipt of aid—in the form of a price reduction—from his supplier. Whatever their accuracy, these assertions ignore the other station operators—the nearby Sun dealers competing with McLean—who were also vitally interested in the particular competitive struggle to which Sun was moved to respond by making price concessions only to McLean. These dealers were hurt, it was found below, by Sun's discriminatory price to McLean and this finding is not challenged here by Sun. Their sales declined appreciably after the December 27, 1955, cut in price by Sun to McLean, and while perhaps not all of the attrition in sales was attributable to the fact that McLean was thereby enabled to drop his price, certain of the dealers were able to identify customers who, apparently retaining a preference for Sun products, shifted their patronage from the competing Sun stations to McLean.

It is asserted, in response, that the harm to competitors of McLean must be suffered as a consequence of the very competition which is the pervasive essence of our overall antitrust policies. As has been said in another context:

> "In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured." H. R. Rep. No. 1422, 81st Cong., 1st Sess. 5–6.

But the mere recognition that harm sometimes may be a by-product of competition is the beginning, not the end, of analysis. Whatever the result here, someone may be hurt—to allow Sun to pursue its discriminatory pricing policy will, as has been indicated, harm other Sun dealers who compete with McLean; to prevent Sun from making discriminatory price allowances, it is asserted, will injure the McLeans of the competitive world. The alternative competitive injury to McLean, however, is not inevitable; Sun may have available to it courses of action which would afford protection to both McLean and the other Sun stations. See pp. 526–527, *infra*. Even if this were not so, we are not free on the basis of our own economic predilections to make the choice between harm to McLean, on the one hand, and to the other Sun operators, on the other, or to balance the comparative degree of individual injury in each instance; that choice is foreclosed by the determination in the statute itself in favor of equality of treatment. It is the very operators of the other Sun stations which compete with McLean who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such purchasers from a single supplier, Sun, would not be injured by that supplier's discriminatory practices. To be sure, the

§ 2 (b) exception is operative notwithstanding the incidence of damage to nonfavored purchasers, *Standard Oil Co.* v. *Federal Trade Comm'n, supra,* but, given the basic statutory purpose to prevent precisely such damage, the defense does not become applicable simply because the favored purchaser would be hurt absent the discriminatory price cut to him. If a threat of harm to the favored customer was itself enough, under § 2 (b), to immunize a discrimination, the § 2 (b) exception could largely nullify the prohibitions of § 2 (a).

Similarly, the mere fact that McLean was a small retailer does not make the good faith defense applicable. While, as noted, the immediate and generating cause of the Robinson-Patman amendments may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores, neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source. The House Committee declared its "guiding ideal" in proposing the amendments to be "the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production . . . ." H. R. Rep. No. 2287, 74th Cong., 2d Sess. 6. In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.

An example will be helpful. Assume that a single store in a large retail grocery chain reduces, without the benefit of any corresponding reduction in price from its supplier, the price of a single and widely advertised staple food product. Is it to be supposed that the Congress which passed the Act would view this reduction as justifying,

under § 2 (b), another supplier's cut in his wholesale price of the same product to a large competing retail chain outlet, without that supplier's offering the same price concession to other smaller retail outlets which compete with both chain stores? Even assuming that the second chain did not predatorily seek the price concession from its own supplier, there can be but one answer to this question under the statute since allowance of such a discrimination would nullify the very equality which is sought to be protected by the Act. To allow the § 2 (b) defense to be so asserted would be directly contrary to the intent of Congress.

Stripped of the initial appeal arising from the fact that Sun was attempting to preserve, not a retail chain, but rather its own small dealer, McLean, the instant facts present, we think, no crucial variation from the example given.

The argument that if the problem actually posed by "small" McLean competing with "big" Super Test were put to Congress it would approve the course followed by Sun is not persuasive. Even if such congressional approval might be assumed—a perhaps unwarranted conclusion [11]—it is clear that Congress did not write or pass a statute which allowed or provided for distinction

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[11] While subsequent legislative materials are neither appropriate nor relevant guides to interpretation of prior enactments, it is interesting to note that a Senate Select Committee on Small Business, reporting in 1956 on a New Jersey gasoline price war, concluded that the Federal Trade Commission should enforce the Act against "all instances of price discrimination," that such action might have stopped the price war in "its incipiency," and that the § 2 (b) defense should not be available to protect a supplier who discriminatorily lowered his price "not for the purpose of meeting the equally low price of a competitor but, rather, to enable some of his dealers to meet the prices charged by competitive gasoline retailers." S. Rep. No. 2810, 84th Cong., 2d Sess. 28–29.

between the posited grocery product case and the one now before us. To make the incidence of the § 2 (b) defense turn on the relative competitive strength of the particular favored customer *vis-à-vis* his price-cutting competitor is not only inapposite but without statutory warrant. The Act is of general applicability and prohibits discriminations generally, subject only to defenses not based upon size. Competitive ability or business size may properly be a measure of antitrust application in other contexts, but there is no basis for reading such a standard into § 2 (b) of this statute.

Limiting invocation of the § 2 (b) defense to those situations in which the discriminatory price cut is made in response to a lower price of the seller's own competitor comports, we think, not only with the objectives of the Robinson-Patman Act but with the general antitrust policy of preserving the benefits of competition.

To allow a supplier to intervene and grant discriminatory price concessions designed to enable its customer to meet the lower price of a retail competitor who is unaided by his supplier would discourage rather than promote competition. So long as the price cutter does not receive a price "break" from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. To permit a competitor's supplier to bring his often superior economic power to bear narrowly and discriminatorily to deprive the otherwise resourceful retailer of the very fruits of his efficiency and convert the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier is hardly an element of reasonable and fair competition. We see no justification for such a result in § 2 (b). Restriction of the defense to those situations in which a supplier responds to the price concessions of its own competitor—

another supplier—maintains general competitive equities. Fairness demands neither more nor less. We discern in § 2 neither a purpose to insulate retailers from lawful and normal competitive pressures generated by other retailers, nor an intent to authorize suppliers, in response to such pressures created solely at the retail level, to protect, discriminatorily, sales to one customer at the expense of other customers.

It is argued, however, that to deny Sun the right to reduce its prices as it did here is to impair price flexibility and promote price rigidity, the very antithesis of competition. We think that the contrary is the case. While allowance of the discriminatory price cut here may produce localized and temporary flexibility, it inevitably encourages maintenance of the long-range and generalized price rigidity which the discrimination in fact protects. So long as the wholesaler can meet challenges to his pricing structure by wholly local and individualized responses, it has no incentive to alter its overall pricing policy. Moreover, as indicated, the large supplier's ability to "spot price" will discourage the enterprising and resourceful retailer from seeking to initiate price reductions on his own. Such reasoning may be particularly applicable in the oligopolistic environment of the oil industry.[12]

We see no reason to permit Sun discriminatorily to pit its greater strength at the supplier level against Super Test, which, so far as appears from the record, is able to sell its gasoline at a lower price simply because it is a more efficient merchandiser, particularly when Super Test's challenge as an "independent" may be the only meaningful source of price competition offered the "major" oil companies, of which Sun is one.

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[12] See generally H. R. Rep. No. 1423, 84th Cong., 1st Sess.; see Note, 29 U. of Chi. L. Rev. 355, 365–366 (1962).

V.

Respondent Sun makes several other arguments in support of its position. First, it asserts that the interpretation of § 2 (b) urged here by the Commission completely ignores the competitive realities of the gasoline vending business. In essence, Sun argues that, practically viewed, Super Test was not merely a competitor of McLean, but also a competitor of Sun. Oil companies, whether major or minor, integrated or nonintegrated, it is asserted, compete not at the wholesale or jobber level, but almost exclusively at the retail level.[13] All competition, Sun says, is directed to sales of the final product—gasoline—to the motoring consumer, and anything that threatens to reduce the sales of a branded gasoline at the retailer's pump is a threat to the supplier whose business is a direct function of its stations' marketing success or failure. It is contended that the individual station is but a "conduit" for the supplier and that Sun is thus in competition with Super Test, considered even only as a retailer.[14]

In a very real sense, however, every retailer is but a "conduit" for the goods which it sells and every supplier could, in the same sense, be considered a competitor of retailers selling competing goods. We are sure Congress had no such broad conception of competition in mind when it established the § 2 (b) defense and, certainly, it

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[13] It appears that there may be some competition, at least among the "major" oil companies, to win the more efficient jobbers and retailers to distribution of their brands of gasoline; a similar competition may exist for preferred locations.

[14] The "lower offer" which, under this analysis, Sun was meeting by its price cut to McLean was the retail price posted by Super Test. Obviously, to the extent that under any such theory the supplier attempted to set, or was responsible for setting, the retail price, there would be inherent antitrust problems arising from possible existence of illegal price-fixing agreements.

intended no special exception for the petroleum industry. It is difficult to perceive convincing reasons rationally confining the thrust of respondent's argument to an area narrow enough to preclude effective emasculation of the prohibitions on discrimination contained in § 2 (a). Only differences of degree distinguish the situation of the gasoline station operator from that of many other retail outlets, and in numerous instances the distinction, if any, is slight. The "conduit" theory contains no inherent limitations and its acceptance would so expand the § 2 (b) defense as to effect a return to the broader "meeting competition" provision of the Clayton Act, which the Robinson-Patman Act amendments superseded.

Sun also argues that the effect of a decision holding the § 2 (b) defense unavailable to it in these circumstances will be to prolong and aggravate the destructive price wars which periodically reoccur in the marketing of gasoline. Whether relevant or not, this contention is best put wholly to one side. Such price warfare appears to be caused by a number of basic factors, not the least of which are industry overcapacity and the propensity of some major refiners to engage in so-called "dual marketing" under which, in order to increase their overall sales and utilize idle facilities, they not only sell branded gasoline to their own dealers but also sell unbranded gasoline to independent retailers or jobbers, often at a lower price. See S. Rep. No. 2810, 84th Cong., 2d Sess. 16–19. Whatever we do here can neither eliminate nor mitigate the major economic forces which are productive of these price wars. Moreover, it is wholly unclear whether allowance of the price discrimination prolongs or shortens the war's duration. (It might be noted that the war was not narrowly contained by Sun's actions here.) There are logical arguments on both sides of the question and none are wholly persuasive. Extensive discussion of the various reasoning would serve no useful purpose. As one study

concludes after canvassing the contentions: "one simply cannot be certain." De Chazeau and Kahn, Integration and Competition in the Petroleum Industry (1959), 481; and see generally, *id.*, pp. 477–483; S. Rep. No. 2810, 84th Cong., 2d Sess. 19–23.

Respondent urges that the interpretation of § 2 (b) which we have adopted unfairly forces its small retailer, McLean, to bear alone what to him is the economically insufferable burden of the entire retail price reduction. This, however, erroneously poses the choice as merely twofold—aid to the retailer by an unlawfully discriminatory price reduction, or no aid at all—and misconceives the availability of other alternatives.

Preliminarily, it must be recognized that we are not dealing here with the situation in which one supplier reduces its prices and another supplier thereupon reduces its prices to prevent its customer from shifting his business to the competing supplier; this is the more normal circumstance and the § 2 (b) defense is usually available.

Even in the limited situation with which we here deal—in which the competing retailer cuts his price without his supplier's aid—Sun, as a wholesaler, may reduce its price uniformly and nondiscriminatorily to competing purchasers from it so as to preclude the probable incidence of the substantial anticompetitive effects upon which violation of § 2 (a) is here grounded. Sun recognizes, as it must, that it has this choice, but argues that in order to eliminate the possibility of having even a broad price cut deemed illegal under § 2 (a), it would of necessity have to extend the benefits of the concessions to all of its dealers in an unwarrantedly wide geographic area, perhaps nationwide. This, it asserts, is required because whatever line it seeks to draw, there will inevitably be some dealer who because of geographic proximity will be deemed to have been illegally discriminated against. The mere existence of a competitive continuum, however, does not

require that market limits be indefinitely extended with absurd results in the form of unwarranted nationwide or otherwise overly broad measures of competitive impact. In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis.[15] In cases in which the economic facts so indicate, carefully drawn area submarkets may be the proper measure of competitive impact among purchasers.[16]

Alternatively, since Sunoco stations, though largely independently owned, operate under leasing, merchandising, advertising and other policies set by Sun, other opportunities are available to Sun to strengthen its dealers in competing with other stations.

Rejecting these and other actions [17] as reasonable business alternatives,[18] Sun asserts that the only course realis-

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[15] Cf. *American Oil Co.*, — F. T. C. —, F. T. C. Dkt. No. 8183, CCH Trade Reg. Rep. ¶ 15,961 (June 27, 1962) (dissenting opinion of Commissioner Elman).

[16] Nothing we say in this case—involving injury only to so-called "secondary-line" competition, that is, competition among buyers—is inconsistent with *Federal Trade Comm'n* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, in which, in the context of asserted injury to "primary-line" competition, that is, competition with the seller, it was held that a "discrimination" under § 2 (a) of the Act comprehends a "difference in price" among even non-competing purchasers, the legality or illegality of which depends upon whether or not there is likely to be substantial injury to competition among sellers.

[17] Since Sun made no attempt here to utilize a so-called "feathered" discount to its dealers, under which the amount of the price allowance diminishes as it reaches stations further away from the center of the price war, we need not expressly pass upon such practice. However, it may be noted that a properly designed and limited price

[*Footnote 18 appears on p. 528*]

tically open to it is to change the nature of its distribution system by effecting some sort of further forward vertical integration, all at the expense and to the detriment of the very independent merchants—the individual station operators—whom the Robinson-Patman Act was intended to preserve and protect. It may be that active pursuit of such a course by Sun, involving the elimination of independent retail dealers, would be a greater evil than allowance of discriminations such as are here involved; such a broad determination of economic policy, however, is not for us to make here. We are not interpreting a broadly phrased constitutional provision, but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions. Compare *Standard Oil Co.* v. *United States*, 337 U. S. 293, 311–312.

In any event, we see no evidence that such forward integration is inevitable or required as the only feasible alternative. It has not yet occurred and suppliers such as Sun have discerned sound and apparently persuasive reasons for heretofore rejecting direct ownership and

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reduction system fashioned in such a manner might, under appropriate circumstances, be found to have obviated substantial competitive harm to the other Sun dealers and thereby negated a violation of § 2 (a) such as is here charged. Of course, improperly designed or too sharply drawn "feathering" gradations may produce precisely the same effect as no gradation at all, and consequently fall within the same ban as an outright illegal discrimination.

[18] Insofar as Sun is free to pursue certain alternative courses of action, it may convert what was a competitive struggle simply at the retail level into one involving a supplier. But, by definition, Sun will not have acted in such a manner as to produce substantial anticompetitive effects at the secondary level, *i. e.*, among Sun's customers. Moreover, not only will there be no price cut by Sun at the expense of nonfavored dealers, but the broader nature of the response required will serve as an inhibition on utilization of price reductions to pursue essentially anticompetitive objectives and will preclude undue restraint upon the enterprising retailer who is willing, and presumably able, to lower his price without the aid of his supplier.

operation of their stations; it is wholly reasonable to believe that such incentives persist.

Having consciously chosen not to effect direct distribution through wholly owned and operated stations, Sun cannot now claim for itself the benefits of such a system and seek to inject itself as a supplier into what on this record appears as a struggle wholly between retailers, when such interference favors one of Sun's customers at the expense of others.

Thus, consistent with overall antitrust policy and the language and very purposes of the Robinson-Patman amendments, we conclude that § 2 (b) of the Act contemplates that the lower price which may be met by one who would discriminate must be the lower price of his own competitor; since there is in this record no evidence of any such price having been set, or offered to anyone, by any competitor of Sun, within the meaning of § 2 (b),[19] Sun's claim to the benefit of the good-faith meeting of competition defense must fail. Accordingly, the judgment of the Court of Appeals is

Reversed.

Separate memorandum of MR. JUSTICE HARLAN, in which MR. JUSTICE STEWART joins.

I agree with the conclusion reached by the Court that, on the present record, Sun has failed to make out a defense under § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act.

However, instead of reversing the judgment below I would remand the case to the Commission so as to afford opportunity for the introduction of further evidence.

[19] In this posture of the case, we find it unnecessary to pass upon the Commission's apparently alternative theory that a lower competitive offer to McLean himself was a prerequisite to Sun's invocation of the § 2 (b) defense.

The Court recognizes, *ante*, p. 512, note 7, that a different case would be presented "if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun." It is true that the burden of proof in establishing a § 2 (b) defense rests on Sun, and that it must therefore bear the responsibility for any gaps in the record. But it is equally true that we are here dealing with an extremely difficult question arising under a singularly opaque and elusive statute.

If, as the Court acknowledges, it may be important to know whether Super Test was integrated, or whether it received a price cut from its supplier, I see no reason to foreclose development of the relevant facts in this proceeding. This case is one of far-reaching importance in the administration of the Robinson-Patman Act, and yet by our final disposition of it we leave unanswered as many questions as we have resolved. If a more complete record would permit resolution of these additional questions, we do both litigants an injustice by refusing to allow such a record to be made. For the Commission, which has had trouble making up its own mind in this area,* has as much interest as the respondent in definitive answers to these perplexing problems.

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*At one time, as indicated by various letters written by the then Director of the Bureau of Investigation in 1954, the Commission took the position that the § 2 (b) defense was available under the facts before us today. See Hearings on Distribution Problems before Subcommittee No. 5 of the House Select Committee on Small Business, 84th Cong., 1st Sess. 459–463, 852–853 (1955).

WILLIAMS *v.* ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 133. Argued December 13, 1962.—Decided January 14, 1963.

Certiorari was granted in this case to consider whether, under the principles enunciated in *Vitarelli* v. *Seaton*, 359 U. S. 535, the discharge of petitioner, a veteran with Civil Service status, from the United States Air Force for alleged misconduct was vitiated by an improper denial of a right to cross-examination at his hearing before the Civil Service Commission on appeal pursuant to § 14 of the Veterans' Preference Act and the Commission's regulations thereunder. Review of the record and argument of counsel, however, disclosed that petitioner's request for cross-examination of witnesses was neither timely nor in conformity with the applicable regulations. *Held:* The *Vitarelli* issue is not adequately presented by this case, and the writ of certiorari is dismissed as improvidently granted. Pp. 531–533. (But see 372 U. S. 765.)

111 U. S. App. D. C. 294, 296 F. 2d 416, certiorari dismissed.

David I. Shapiro argued the cause for petitioner. With him on the briefs was *Sidney Dickstein*.

Stephen J. Pollak argued the cause for respondents. On the brief were *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Bruce J. Terris, Alan S. Rosenthal* and *David L. Rose*.

PER CURIAM.

Petitioner, a veteran with civil service status, was discharged from his civilian position with the United States Air Force for alleged misconduct. Subsequent to unsuccessful prosecution of appropriate administrative proceedings for review of his discharge, he brought suit in the District Court, which granted summary judgment to the respondent Air Force. The Court of Appeals affirmed.

111 U. S. App. D. C. 294, 296 F. 2d 416. Certiorari was granted, 369 U. S. 884, to consider whether, under the principles enunciated by this Court in *Vitarelli* v. *Seaton*, 359 U. S. 535, 544–545, petitioner's discharge was vitiated by an improper denial of a right to cross-examine at his hearing before the Civil Service Commission on appeal pursuant to § 14 of the Veterans' Preference Act of 1944 [1] and the implementing regulations [2] promulgated by the Commission.

Review of the record and argument of counsel disclose, however, that the *Vitarelli* issue is not adequately presented by this case; accordingly, we conclude that the writ of certiorari should be dismissed as improvidently granted.

Although amply notified in advance of the nature of the charges, the names of the witnesses whose affidavits had supplied the factual basis for his dismissal, and the date of the hearing, neither petitioner nor his counsel made any request, prior to the hearing, of the Air Force, of the Commission or its examiner, or of the witnesses themselves, for their appearance for cross-examination. The request for production of the witnesses, made only at the hearing by petitioner's counsel, was neither timely nor in conformity with the applicable regulations, which contemplate that the party desiring the presence of witnesses, either for direct examination or cross-examination, shall assume the initial burden of producing them.[3]

Had petitioner discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own failed, then, to give mean-

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[1] 58 Stat. 390, as amended, 5 U. S. C. § 863.

[2] 5 CFR, Part 22.

[3] 5 CFR § 22.607, titled "Appearance of witnesses," provides:

"The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses."

ing to the language contained in the regulations affording the "opportunity . . . for the cross-examination of witnesses," [4] the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available and under the Air Force's control. *Vitarelli* v. *Seaton*, 359 U. S. 535, 544–545, would so require. Here, however, though petitioner seeks to rely upon the regulations, he has failed to bring himself within them.

Petitioner was accorded ample opportunity to present his own case and rebut the charges against him at several levels of the proceedings before the Air Force and the Civil Service Commission.

The writ of certiorari is dismissed.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

After 16 years of faithful government service, petitioner has been branded with a stigma and discharged on the strength of three affidavits. Though he asked that these affiants be produced at his hearing, none was called to confront him. The Court says that petitioner's request came too late to conform with the applicable Regulation.[1] Due process dictates a different result. We have heretofore analogized these administrative proceedings that cast the citizen into the outer darkness to proceedings that "involve the imposition of criminal sanctions"; and we have looked to "deeply rooted" principles of criminal law

[4] 5 CFR § 22.603 provides:

"Opportunity will be afforded for the introduction of evidence (including testimony and statements by the employee and his designated representative and witnesses and by representatives of the agency and its witnesses) and for the cross-examination of witnesses."

[1] See 5 CFR, pt. 22, §§ 22.603, 22.607.

for guidance in construing regulations of this character. *Peters* v. *Hobby*, 349 U. S. 331, 344–345; *Greene* v. *McElroy*, 360 U. S. 474, 496. By that analogy we should construe the present Regulation as being protective of the right of confrontation, not as providing a technical way in which the right is either saved or lost.

Confrontation and cross-examination are, as I understand the law, vital when one's employment rights are involved. See *Greene* v. *McElroy*, *supra*, 496; *Beard* v. *Stahr*, 370 U. S. 41, 43 (dissenting opinion). Petitioner is not merely being "denied . . . the opportunity to work at one isolated and specific military installation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896. The stigma now attached to him will follow him, whatever employment he seeks. The requirements of due process provided by the Fifth Amendment should protect him against this harsh result by giving him the same right to confront his accusers as he would have in a criminal trial. See *Mattox* v. *United States*, 156 U. S. 237; [2] *Kirby* v. *United States*, 174 U. S. 47, 55; *Curtis* v. *Rives*, 123 F. 2d 936, 938. For this discharge will certainly haunt his later life as much as would a conviction for willful evasion of taxes.

A trial for misconduct involving charges of immorality, like one for disloyalty, is likely to be "the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without metic-

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[2] "The primary object of the constitutional provision . . . [is] to prevent depositions or *ex parte* affidavits . . . being used . . . in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U. S., at 242–243.

ulous regard for the decencies of a fair trial is abhorrent to fundamental justice." *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 180 (concurring opinion).

Petitioner has been deprived of his job and permanently stigmatized without being confronted by his accusers, even though he requested that they be called and even though they could easily have been produced. Petitioner does more than rely on the Regulation. He relies on the Fifth Amendment and the Sixth Amendment. To be sure, his request at the hearing was not phrased in constitutional terms. But administrative procedures are not games in which rights are won or lost on the turn of a phrase. In the District Court he claimed that this procedure "was arbitrary and capricious and violative of the Fifth and Sixth Amendments of the Constitution." That adequately raised the issue. See *Terminiello* v. *Chicago,* 337 U. S. 1, 6; cf. *Williams* v. *Georgia,* 349 U. S. 375. It should be remembered that while a veteran's proceeding before the Civil Service Commission is called an "appeal," it is usually the first opportunity the employee has for a "hearing" on the charges against him. In *Vitarelli* v. *Seaton,* 359 U. S. 535, 544–545, we construed a Regulation substantially similar to the present one as requiring the Interior Department to call as witnesses all "non-confidential" informants. The Government advances no persuasive reason why that case does not control this one. At the hearing, when petitioner requested that the witnesses be called, his request was rejected because "the Air Force Academy saw no need for their attendance." But one who desires confrontation with the accuser has such a conflict of interest with his adversary that he, rather than his opponent, can better determine what would or might be useful to his defense.[3]

[3] A related problem revealing the manner in which business firms are barred from participating directly or indirectly in government contracts without notice, opportunity to be heard, and confrontation

I would not say that this important constitutional right was lost on the technicality the Court now embraces.

We should not saddle these administrative proceedings with strict formalities concerning the manner in which exceptions or objections are made. They have no place in criminal proceedings, as Rule 51 of the Federal Rules [4] makes clear; and it is unhealthy to let them take root in administrative hearings where human rights are involved that are as precious to "liberty," within the meaning of the Fifth Amendment, as a person's right not to be fined or imprisoned unless prescribed procedures are followed.

The judgment below should be reversed and the case remanded for a full hearing.

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is discussed in the Committee Report on Debarment and Suspension of Persons from Government Contracting and Federally Assisted Construction Work prepared for the Administrative Conference of the United States by the Committee on Adjudication of Claims, October 1, 1962.

[4] Rule 51 provides:

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, *v.* MONOLITH PORTLAND CEMENT CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 528. Decided January 14, 1963.

The Internal Revenue Code of 1939 permitted taxpayers to deduct as a depletion allowance a percentage of "gross income from mining" and defined "mining" as including the "ordinary treatment processes normally applied by mine owners . . . to obtain the commercially marketable mineral product or products." During the taxable year 1952, respondent mined limestone from its own quarry, crushed it, transported the crushed product two miles to its plant, and there, through the addition of other materials and further processing, manufactured the limestone into cement, which it sold. *Held:* Respondent's depletion allowance must be based, not upon the value of the finished cement, but upon the value of the product of the "mining" when it reached the crushed limestone stage. *United States* v. *Cannelton Sewer Pipe Co.*, 364 U. S. 76. Pp. 537–539.

301 F. 2d 488, reversed.

Solicitor General Cox, Acting Assistant Attorney General Jones, Ralph S. Spritzer and *Melva M. Graney* for petitioner.

Joseph T. Enright and *Norman Elliott* for respondent.

PER CURIAM.

The taxpayer respondent during the taxable year 1952 mined limestone from its own quarry, crushed it, transported the crushed product two miles to its plant, and there, through the addition of other materials and further processing, manufactured the limestone into cement which it sold. It paid taxes for the year mentioned, based on a depletion allowance computed in accordance with Treas-

ury Regulations. Thereafter taxpayer filed claim for refund and now prosecutes this suit on the ground that the depletion allowance should not have been based upon constructive income at the crushed limestone stage, but rather upon gross receipts from sales of the mining product after its "treatment processes" were completed and it became finished cement.[1] The District Court found that the taxpayer's depletion base was the income from the sale of finished cement, and the Court of Appeals affirmed. 301 F. 2d 488.

Section 23 (m) of the Internal Revenue Code of 1939, 53 Stat. 14, provided that in computing taxable net income certain percentage deductions from gross income should be allowed for depletion of mines. The Congress further provided, § 114 (b)(4) of the Code, as amended, c. 63, § 124 (c)(B), 58 Stat. 45 (1944), that included within the term "mining" were "the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product . . . ."

In *United States* v. *Cannelton Sewer Pipe Co.*, 364 U. S. 76 (1960), we considered at some length the application of this term to the mining industry and held that the statutory percentage depletion allowance on the gross income of an integrated mining operator should be cut off at the point where the mineral first became suitable for industrial use or consumption. After careful study of the record here we believe that this case is controlled by *Cannelton*. We concluded there "that Congress intended to grant miners a depletion allowance based on the constructive income from the raw mineral product, if marketable in that form, and not on the value of the finished

[1] There is no question involved here under the Act of September 14, 1960, 74 Stat. 1017, since taxpayer elected to pursue his claim for depletion on the finished cement product rather than accept as a correct cut-off point for depletion the prekiln feed stage of manufacture as permitted by that Act.

articles." 364 U. S., at 86. We found that "the cut-off point where 'gross income from mining' stopped has been the same" ever since the first depletion statute, namely, "where the ordinary miner shipped the product of his mine." *Id.*, at 87. It therefore appears from this record that the "product" with which the Code deals here is the taxpayer's product at the point when "mining" terminated, *i. e.*, when it reached the crushed limestone stage.[2] This results in limiting the taxpayer's basis for depletion to its constructive income from crushed limestone, rather than from finished cement.

The petition for certiorari is therefore granted, the judgment reversed, and the case is remanded for disposition in accordance with this opinion.

It is so ordered.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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[2] In this connection crushed limestone was not only "marketable in that form" but, according to the Preprint from Bureau of Mines Minerals Yearbook, 1952, Stone, p. 26, an exhibit in the record, it was actually sold in California in 1952 in an amount exceeding 1,500,000 tons. Sales in the United States for that year exceeded 216,000,000 tons. Both of these figures exclude the tonnage used in the manufacture of cement. A stipulation in the record shows that limestone sold or used for all purposes totaled almost 300,000,000 tons in 1952.

SHENANDOAH VALLEY BROADCASTING, INC., ET AL. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 592. Decided January 14, 1963.

Appeal dismissed for want of jurisdiction.

Reported below: 208 F. Supp. 896.

Ralstone R. Irvine and *Walter R. Mansfield* for appellants.

Arthur H. Dean, William Piel, Jr., Herman Finkelstein and *Lloyd N. Cutler* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

DITSON *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 729, Misc. Decided January 14, 1963.

Certiorari granted; judgment vacated; and cause remanded.

Hugh R. Manes for petitioner.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In view of the suggestion of mootness by reason of the execution of the petitioner, the judgment of the Supreme Court of California is vacated and the cause is remanded for such proceedings as that court may deem appropriate.

[NOTE: Upon petition by the State for rehearing or clarification, the above opinion was withdrawn and, upon the prior suggestion of mootness, the petition for writ of certiorari was dismissed. 372 U. S. 933.]

LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL–CIO, *v.* CURRY ET AL., DOING BUSINESS AS S. J. CURRY & CO.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 87. Argued November 7–8, 1962.—Decided January 21, 1963.

Respondents sued in a Georgia state court to enjoin a labor union from picketing the site where they were engaged in construction work. They alleged that the picketing was for the purpose of forcing them to hire only union labor and that it violated the Georgia right-to-work statute. The union contended that its picketing was for the sole purpose of publicizing the facts about the wages paid by respondents and that its activities were within the exclusive jurisdiction of the National Labor Relations Board. It was stipulated that respondents had purchased more than $50,000 worth of goods and commodities from outside of Georgia. The trial court denied a temporary injunction. The Georgia Supreme Court found that the picketing was peaceful and that the evidence was sufficient to sustain a finding that respondents were not paying wages conforming with those paid on similar types of work in the area, as required by their contract; but it concluded that the picketing was for the purpose of forcing respondents to employ only union labor and that, therefore, it violated the Georgia statute. It held that the trial court had erred in denying a temporary injunction. This Court granted certiorari. *Held:*

1. The allegations of the complaint, as well as the findings of the Georgia Supreme Court, made out at least an arguable violation of § 8 (b) of the National Labor Relations Act, and the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which was within the exclusive jurisdiction of the National Labor Relations Board. Pp. 543–548.

2. The judgment of the Supreme Court of Georgia was "final," within the meaning of 28 U. S. C. § 1257, and this Court has jurisdiction to review it. Pp. 548–552.

(a) The judgment falls within that small class which finally determines claims of right separable from, and collateral to, rights asserted in the main action, claims which are too important to be denied review and too independent of the cause itself to require that

appellate consideration be deferred until the whole case is adjudicated. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. Pp. 548–549.

(b) The policy of 28 U. S. C. § 1257 against piecemeal reviews of state court judgments does not prevent this Court holding that the judgment was final, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard exclusively by the National Labor Relations Board, not by state courts. Pp. 549–550.

(c) Since the Georgia Supreme Court resolved the merits of the issues raised in the course of the hearing on the temporary injunction and left nothing of substance to be decided in the trial court, as petitioner conceded, its judgment was "final" within the meaning of 28 U. S. C. § 1257. Pp. 550–551.

(d) *Montgomery Building Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178, does not require a different conclusion. P. 552.

217 Ga. 512, 123 S. E. 2d 653, reversed.

John S. Patton and *Edwin Pearce* argued the cause and filed briefs for petitioner.

Robert B. Langstaff argued the cause for respondents. With him on the brief was *H. H. Perry, Jr.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In the face of petitioner's claim that the subject matter of this suit was within the exclusive jurisdiction of the National Labor Relations Board, the Supreme Court of Georgia reversed the denial by the trial court of a temporary injunction sought by respondents. 217 Ga. 512, 123 S. E. 2d 653. We granted certiorari to consider the jurisdiction of the Georgia court to authorize the entry of an injunction and requested the parties to brief also the question of our own jurisdiction to review the Georgia court's judgment under 28 U. S. C. § 1257. 369 U. S. 883.

Respondents, partners in the contracting business, entered into a construction contract with the City of Atlanta requiring that wages paid by respondents "conform with those being paid on similar types of work in

the Atlanta area." Shortly after the beginning of construction, various unions in the Atlanta area visited respondents, whose practice it was to hire without regard to union membership and whose employees were not represented by a union. According to respondents the unions strongly urged the hiring of union labor, whereas the unions recalled only their request for respondents to raise their pay scales to those prevailing in the area. Some months later, following unsuccessful efforts by the unions to have the City of Atlanta persuade respondents to pay higher wages, petitioner placed a single picket at the construction site. Thereupon employees of other contractors not under respondents' supervision refused to work and respondents experienced difficulty in having materials and supplies delivered. Construction slowed, respondents laid off all but 37 of the 72 men working for them, and their ability to finish the job within the time provided in the contract was jeopardized.

Respondents then brought this action for an injunction in the Superior Court of Fulton County, Georgia, alleging that petitioner's picketing was for the purpose of forcing respondents to hire only union labor, all in violation of the Georgia right-to-work statute.[1] A hearing upon respond-

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[1] The Georgia right-to-work law, Ga. Code, § 54–804, provides:

"*Compelling persons to join, or refrain from joining, labor organization, or to strike or refrain from striking.*—It shall be unlawful for any person, acting alone or in concert with one or more other persons to compel or attempt to compel any person to join or refrain from joining any labor organization, or to strike or refrain from striking against his will, by any threatened or actual interference with his person, immediate family, or physical property, or by any threatened or actual interference with the pursuit of lawful employment by such person, or by his immediate family."

The Georgia Supreme Court also referred to Ga. Code, § 66–9906, which provides:

"*Unlawfully preventing laborers, etc., from performing duties.*—Any person or persons, who, by threats, violence, intimidation, or

ents' request for a temporary injunction was held. According to the union its picketing was for the sole purpose of publicizing the facts about the wages being paid by respondents, and in any event its activities were claimed to be within the exclusive jurisdiction of the National Labor Relations Board. It was stipulated that respondents had purchased more than $50,000 worth of goods and commodities from outside the State of Georgia.[2] The temporary injunction was denied without opinion and respondents appealed. The Georgia Supreme Court found the picketing to be peaceful and the evidence sufficient to sustain a finding that respondents were not paying wages conforming with those paid on similar types of work in the Atlanta area. Relying upon and quoting from an earlier case, the court nevertheless concluded on the whole record that the picket was placed on the job for the purpose of forcing the employer "to employ only union labor, or be unable to comply with the terms of his contract . . . such picketing is for an unlawful purpose, and clearly a violation of the provisions of *Code Ann. Supp.* § 54–804 . . . ." [3] The judgment of the court was that "the trial judge erred in refusing the interlocutory injunction," this judgment later being entered upon the minutes of the trial court and made the judgment of that court.

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other unlawful means, shall prevent or attempt to prevent any person or persons from engaging in, remaining in, or performing the business, labor, or duties of any lawful employment or occupation, shall be guilty of a misdemeanor."

[2] Although respondents point out that there has been no judicial determination of effect on interstate commerce, we do not understand that they question the accuracy or validity of the stipulation or that their purchases from outside Georgia meet the direct inflow standards set by the NLRB for the exercise of its jurisdiction. See Twenty-Third Annual Report, National Labor Relations Board, p. 8 (G. P. O., 1958).

[3] 217 Ga., at 514, 123 S. E. 2d, at 655, quoting from *Powers* v. *Courson*, 213 Ga. 20, 96 S. E. 2d 577.

Upon such a record, we hold that this Court has appellate jurisdiction under § 1257 and we reverse the judgment below as beyond the power of the Georgia courts. The allegations of the complaint, as well as the findings of the Georgia Supreme Court, made out at least an arguable violation of § 8 (b) of the National Labor Relations Act, 29 U. S. C. § 158 (b).[4] Consequently, the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the

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[4] Sections 8 (b) (1) (A), 8 (b) (2), 8 (b) (4) (B), and 8 (b) (7) (C) provide, in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

. . . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9:

National Labor Relations Board. *Plumbers Union* v. *Door County,* 359 U. S. 354, 359; *San Diego Council* v. *Garmon,* 359 U. S. 236, 244–245; *Hotel Employees Union* v. *Sax Enterprises, Inc.,* 358 U. S. 270; *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 478, 481; *Garner* v. *Teamsters Union,* 346 U. S. 485, 489–491. Nor is the jurisdiction of the Georgia courts sustainable, as respondents urge, by reason of the Georgia right-to-work law and by § 14 (b) of the National Labor Relations Act, 29 U. S. C.

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

. . . . . .

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

. . . . . .

"(C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* . . . That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b)."

See also *Meat Cutters Local 427* v. *Fairlawn Meats, Inc.,* 353 U. S. 20, 23; *Radio Union* v. *Labor Board,* 347 U. S. 17, 40–42, 52–53; *Labor Board* v. *Local Union No. 55,* 218 F. 2d 226, 232 (C. A. 10th Cir.).

§ 164 (b). This precise contention has been previously considered and rejected by this Court. *Local Union 429* v. *Farnsworth & Chambers Co.*, 353 U. S. 969, reversing 201 Tenn. 329, 299 S. W. 2d 8. The Georgia Supreme Court clearly exceeded its power in authorizing the issuance of a temporary injunction.

Respondents would nevertheless have us dismiss this case as beyond our appellate jurisdiction since 28 U. S. C. § 1257 limits our authority to the review of final judgments of state courts and since the Georgia Supreme Court authorized the issuance of only a temporary injunction, thus leaving a permanent order still to be issued after further hearings in the trial court. But we believe our power to review this case rests upon solid ground. The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction (compare *Gibbons* v. *Ogden*, 6 Wheat. 448) nor is it the question of whether federal or state law governs a case properly before the Georgia courts. Compare *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board.

Whether or not the Georgia courts have power to issue an injunction is a matter wholly separate from and independent of the merits of respondents' cause. The issue on the merits, namely the legality of the union's picketing, is a matter entirely apart from the determination of whether the Georgia court or the National Labor Relations Board should conduct the trial of the issue.

The jurisdictional determination here is as final and reviewable as was the District Court's decision in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, exempting plaintiffs in a stockholder's suit filed in a federal court from filing a bond pursuant to a state statute. That ruling was held a final judgment under 28 U. S. C. § 1291 even though the trial in the case was still to take place. The judgment before us now, like the judgment in *Cohen*, falls "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." *Id.*, at 546. And in *Radio Station WOW* v. *Johnson*, 326 U. S. 120, the authority of the Nebraska courts to award relief assertedly within the exclusive power of the Federal Communications Commission was held separable from the accounting which was still to take place in the state courts.[5] "In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Id.*, at 126.[6]

There is no doubt that the jurisdiction of the Georgia courts has been finally determined by the judgment below

[5] The Court granted certiorari "because of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission" and directed attention to the question of whether or not the judgment of the Nebraska court was a final one. 326 U. S., at 123.

[6] This, of course, was consistent with and followed older cases recognizing a judgment as final even though an accounting was still to take place. *Forgay* v. *Conrad*, 6 How. 201; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362.

and is not subject to further review in the state courts. *Lankford* v. *Milhollin,* 201 Ga. 594, 599, 40 S. E. 2d 376, 379; *Smoot* v. *Alexander,* 192 Ga. 684, 686, 16 S. E. 2d 544, 545; *Dixon* v. *Federal Farm Mtg. Corp.,* 187 Ga. 660, 661, 1 S. E. 2d 732, 733; *Blackwell* v. *Southland Butane Co.,* 95 Ga. App. 113, 115, 97 S. E. 2d 191, 192. Unless this judgment is reviewable now, petitioner will inevitably remain subject to the issuance of a temporary injunction at the request of the respondents and must face further proceedings in the state courts which the state courts have no power to conduct. If the permanent injunction issues, petitioner could then come here seeking the doubtful privilege of relitigating the entire matter before the National Labor Relations Board. The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board. The policy of 28 U. S. C. § 1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments does not prohibit our holding the decision of the Georgia Supreme Court to be a final judgment, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts.

There is another entirely adequate reason for sustaining our authority to review in this case. In *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 382, the Georgia Supreme Court reversed the order of a trial court sustaining a general demurrer to a suit to enjoin an employee from prosecuting a suit against his employer in the Alabama courts under the Federal Employers' Liability Act. The demurrer had raised the provisions of the federal statute

as a bar to the power of the Georgia courts to issue the injunction. The Georgia court's denial of this federal claim was held reviewable here although ordinarily the overruling of a demurrer is not a final judgment. This Court looked to the whole record, as we are entitled to do in determining questions of finality, *Department of Banking* v. *Pink,* 317 U. S. 264, 268; *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 547; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69, 72, and concluded that for all practical purposes the litigation in the Georgia courts was terminated, since the employee freely conceded he had no further defenses to offer in the state courts, relying upon *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69.

We have a quite similar situation here. The Georgia Supreme Court not only finally asserted its power to deal with the subject matter of this suit, but it also resolved the merits of the issues raised in the course of the hearing upon the temporary injunction. Petitioner's conduct was adjudged to be in violation of the Georgia right-to-work law and an injunction was authorized. Petitioner conceded before this court that he had no further factual or legal issues to present to the Georgia trial court and respondent does not suggest that the matters adjudicated by the Georgia Supreme Court are not final and conclusive upon petitioner and the lower court.[7] Since there was nothing more of substance to be decided in the trial court, the judgment below was final within the meaning of 28 U. S. C. § 1257 and within the scope of the *Pope* and *Richfield* cases. Cf. *Clark* v. *Williard,* 292 U. S. 112.[8]

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[7] See cases cited in text, *ante,* p. 550.

[8] According to respondents, they urgently desire to litigate at the hearing upon a permanent injunction the question of whether they violated their contract with the city, which in their view the Georgia

There remains the matter of *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U. S. 178, where the Court applied the salutary and long-standing rule that decisions upon interlocutory injunctions are not final judgments. *Ledbetter*, of course, was decided before *Garner* v. *Teamsters Union*, 346 U. S. 485, and subsequent pre-emption cases [9] in this Court, and at a time when the respective jurisdiction of the National Labor Relations Board and the state courts was a much mooted issue. Moreover, the Alabama court did not pass upon the merits of the injunction claim, the union there had withdrawn an answer which controverted important allegations of the complaint, and it was not at all clear that there was nothing left to be litigated in the Alabama trial court. This Court apparently preferred to avoid deciding this important matter of federal and state relationships where the decision below did not have all of the traditional badges of finality. Cf. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62. In any event, however, to the extent that *Ledbetter* may be said to prohibit our review of a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state court is pre-empted by federal law and by the exclusive power of the National Labor Relations Board, we decline to follow it.

The judgment is

Reversed.

Supreme Court did not squarely decide. But in view of the characterization of the picketing by the Georgia Supreme Court as being for the purpose of coercing the hiring of only union labor, it is still true that as far as petitioner is concerned, there is nothing more of substance to be litigated in the trial court.

[9] *E. g., San Diego Council* v. *Garmon*, 359 U. S. 236, and cases cited in text, *ante*, p. 547.

MR. JUSTICE HARLAN, concurring in the result.

I join in the determination that we have appellate jurisdiction in this case, and in the reversal of the judgment below. But I believe that the approach taken by the Court to the question of "finality" is far broader than the case demands, or than precedent and policy would warrant.*

At least until today, none of this Court's decisions could be interpreted to suggest that a state court's determination as to state versus federal jurisdiction could, without more, be considered a final judgment subject to our review when further proceedings on the merits were still pending. Indeed, *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178, held expressly to the contrary, despite the fact that the determination of jurisdiction had been coupled, as in the present case, with the issuance of a temporary injunction. In *Ledbetter*, as here, it was claimed that the temporary injunction might well have the practical effect of mooting the underlying dispute, thereby aborting any review of the jurisdictional issue.

Neither *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, nor *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120, lends support to the view that a determination of jurisdiction at this stage, simply by virtue of its separability from the rest of the case, can be deemed a final judgment. For here, unlike *Cohen*, the question now raised would be merged in the final judgment and would be open to review by this Court at that time. And unlike *Radio Station WOW*, where the subsequent state proceedings could not moot the controversy sought to be brought

*My views in this area are more fully set forth in the dissenting opinion I have filed in *Mercantile National Bank* v. *Langdeau*, *post*, p. 572.

before the Court, a victory for this petitioner in the permanent injunction proceedings would effectively dispose of the entire case.

In any event, there is no need to strain these precedents to the breaking point, since as the Court itself recognizes (*ante*, p. 550), "There is another entirely adequate reason for sustaining our authority to review in this case." During oral argument before the Court, petitioner conceded that in any proceedings on the issuance of a permanent injunction, it would have nothing left to litigate. In other words, the state courts having decided that they had jurisdiction and that the picketing was for an unlawful purpose, the petitioner would have nothing further to offer on these or any other issues, and the issuance of a permanent injunction would follow as a matter of course.

It being clear that the entire case must stand or fall on the federal claim now presented, the case is squarely governed by *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379. Since what remains to be done is only a formality, the judgment sought to be reviewed is final in every significant sense. No such showing was made in *Ledbetter, supra*, and the case is readily distinguishable on this ground. No doubts should be cast on the vitality of *Ledbetter;* still less should it be overruled.

Syllabus.

MERCANTILE NATIONAL BANK AT DALLAS *v.* LANGDEAU, RECEIVER.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 14. Argued February 27–28, 1962.—Restored to the calendar for reargument April 2, 1962.—Reargued December 5, 1962.—Decided January 21, 1963.*

Appellee, the receiver of a Texas insurance company in liquidation in a Texas State Court in Travis County, brought an action in that Court against two national banks and 143 other parties, alleging a conspiracy to defraud the insurance company and claiming damages. Each national bank filed a plea of privilege under Texas practice, asserting that it was located in Dallas County and, therefore, was immune from suit in a state court elsewhere under § 5198 of the Revised Statutes, which provides that actions against a national bank "may be had" in any state court in the county or city in which it is located. On an appeal in which it was agreed that the only issue was whether § 5198 entitled the national banks to have the action transferred to the state court in Dallas County or whether venue was controlled by a Texas statute, the Texas Supreme Court refused to accept § 5198 as prohibiting a suit against the national banks in Travis County, where a state venue statute expressly permitted it. The banks appealed to this Court. *Held:*

1. The judgments of the Texas Supreme Court are "final," within the meaning of 28 U. S. C. § 1257 (2), and this Court has jurisdiction of the appeals. Pp. 557–558.

2. Section 5198 of the Revised Statutes is controlling here, and this suit in a state court against national banks may not be maintained in a county or city other than that in which they are located. Pp. 558–567.

(a) National banks are instrumentalities of the Federal Government, and Congress had and exercised the authority to prescribe the manner and circumstances under which they could sue or be sued. Pp. 558–559.

(b) Congress intended that a national bank could not be sued against its will in any court other than those specified in § 5198. Pp. 559–564.

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*Together with No. 15, *Republic National Bank of Dallas* v. *Langdeau, Receiver*, also on appeal from the same Court.

(c) Section 5198 has not been repealed, and it is fully effective. Pp. 565–567.

161 Tex. 349, 341 S. W. 2d 161, reversed.

Hubert D. Johnson and *Marvin S. Sloman* reargued the cause for appellants. With them on the briefs was *Neth L. Leachman.*

William E. Cureton and *Quentin Keith* reargued the cause for appellee. With them on the briefs was *Cecil C. Rotsch.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellee, the receiver for a Texas insurance company in liquidation in the Ninety-eighth District Court of Travis County, Texas, brought an action in that court against the two national banks who are appellants here and against 143 other parties, alleging a conspiracy to defraud the insurance company and claiming damages jointly and severally in the amount of 15 million dollars. Each appellant filed a plea of privilege, as provided by the Texas Rules of Civil Procedure, asserting that it was located in Dallas County, Texas, and was therefore immune from suit in Travis County under the provisions of Rev. Stat. § 5198 (1878), 12 U. S. C. § 94, which provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." [1]

[1] See Appendix, No. 4. The pertinent national bank legislation appears in the Appendix to this opinion, *post,* p. 567.

Appellee, on the other hand, relied upon Texas Insurance Code, Art. 21.28, Section 4 of which provides:

> "(f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all action or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

The pleas of the banks were overruled and they appealed, it being agreed that the only issue for review was whether 12 U. S. C. § 94 entitled appellants to have the action transferred to the state court in Dallas County or whether the state venue provision contained in § 4 (f) of the Insurance Code was controlling. The Court of Civil Appeals reversed and sustained the pleas of privilege on the ground that 12 U. S. C. § 94 required an action against a national bank to be brought in the county of its location. The Texas Supreme Court, however, refused to accept § 94 as prohibiting a suit against petitioners in Travis County when a state venue statute expressly permitted it. 161 Tex. 349, 341 S. W. 2d 161. On the one hand, the court interpreted § 94 as permissive only, not mandatory, and on the other, as having been repealed by an omnibus repealing clause in an 1882 statute [2] subsequently absorbed into 28 U. S. C. § 1348.[3] Appellants brought the cases here under 28 U. S. C. § 1257 (2) and, because of the finality question, we postponed ruling upon our jurisdiction until the merits were considered. 368 U. S. 809.

I.

The question of our appellate jurisdiction is quite similar to the one considered in *Construction Laborers* v. *Curry, ante,* p. 542, although there the jurisdiction of

[2] See Appendix, No. 6.

[3] See Appendix, No. 8.

any and all state courts was at issue and here the inquiry is only as to which state court has proper venue to entertain an action against two national banks. Nonetheless, a substantial claim, appealable under state law, is made that a federal statute, rather than a state statute, determines in which state court a national bank may be sued and, as in *Curry,* prohibits further proceedings against the defendants in the state court in which the suit is now pending. This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. Accordingly, we note our jurisdiction to hear these appeals under § 1257 (2) and turn now to the question of whether appellants may be sued in the Travis County court.

II.

The roots of this problem reach back to the National Banking Act of 1863, 12 Stat. 665, replaced a year later by the Act of 1864, 13 Stat. 99.[4] National banks are federal instrumentalities and the power of Congress over them is extensive. "National banks are quasi-public institutions, and for the purpose for which they

[4] The history of national banking in the United States begins with the First Bank of the United States, chartered in 1791 (1 Stat. 191; see *Bank of the United States* v. *Deveaux,* 5 Cranch 61), which continued in existence until 1811. 1 Dictionary of American History 155 (1940). The Second Bank was incorporated in 1816, 3 Stat. 266, see *Osborn* v. *Bank of the United States,* 9 Wheat. 738, and terminated in 1836 when its charter was permitted to expire. *Ibid.*

are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit." *Van Reed* v. *People's Nat. Bank,* 198 U. S. 554, 557. Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts and it addressed itself to this matter in the 1863 Act.

By § 11 of that Act the banking associations were given general corporate powers, among them the power to "sue and be sued . . . in any court of law or equity as fully as natural persons." [5] This section, if the teaching of *Bank of the United States* v. *Deveaux,* 5 Cranch 61, is observed, conferred no jurisdiction upon the courts but merely endowed the banks with power to sue and be sued in the courts as corporations. Congress, however, had more to say about this subject. Section 59 of the 1863 Act [6] provided that suits by and against any association under the Act could be had in any federal court held within the district in which the association was established. No mention was made of suits in state courts. If the law had remained in this form, there might well have been grave doubt about the suability of national banks in the state courts, as this Court noted in *First Nat. Bank* v. *Union Trust Co.,* 244 U. S. 416, 428.[7]

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[5] See Appendix, No. 1.

[6] *Ibid.*

[7] "[O]ur conclusion on this subject is fortified by the terms of § 57, c. 106, 13 Stat. 116 [the 1864 Act, discussed *infra*], making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although without the grant of the act of Congress such controversies would have been federal in character." 244 U. S., at 428. But cf. *Claflin* v. *Houseman,* 93 U. S. 130, 135.

The next year, however, Congress expressly exercised its power to permit national banks to be sued in certain state courts as well as in federal courts. Section 57 of the 1864 Act [8] carried forward the former § 59 and also added that "suits . . . may be had . . . in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases . . . ." The phrase "suits . . . may be had" was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will.

We would not lightly conclude that a congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 and its predecessors. See *United States* v. *Menasche,* 348 U. S. 528, 539; *Montclair* v. *Ramsdell,* 107 U. S. 147, 152. Appellee, however, would have us hold that any state court could entertain a suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county. This we are unwilling to do, particularly in light of the history of § 57. That section was omitted from Title 62 (National Banks) of the Revised Statutes of 1873, but at the same time, there were included in Title 13 (The Judiciary) provisions granting the federal courts jurisdiction over suits by and against national banks brought in the district of their residence.[9] These express provisions relating to the jurisdiction of the federal courts apparently did not solve the entire problem, for § 5198 of Title 62, Revised Statutes, was amended

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[8] See Appendix, No. 2.

[9] See Appendix, No. 5.

in 1875 by adding to it provisions substantially identical to § 57 of the 1864 Act.[10] Thus for a second time Congress specified the precise federal and state courts in which suits against national banks could be brought.

All of the cases in this Court which have touched upon the issue here are in accord with our conclusion that national banks may be sued only in those state courts in the county where the banks are located.[11] Notable among these is *Charlotte Nat. Bank* v. *Morgan,* 132 U. S. 141, which involved a suit against a national bank brought in a county other than that in which the bank was located. This Court stated that § 57 conferred a personal privilege on the banks exempting them from suits in state courts outside their home counties. However, since the bank in that case had not objected at the trial to the location of the suit but raised the issue for the first time on appeal, the Court held that the § 57 privilege had been waived.[12]

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[10] See Appendix, No. 3.

[11] *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, was a suit in state courts against a national bank in default on its notes. The national bank contended that since it was an instrumentality of the Federal Government, it was not subject to suit in state courts. This Court, noting that the suit was in a state court where the bank was located, sustained the power of the state court squarely upon the provisions of § 57. Subsequently, *Casey* v. *Adams,* 102 U. S. 66, reaffirmed the mandate of § 57, then Rev. Stat. § 5198, as applied to ordinary transitory actions but held that Congress did not intend it to apply to local, *in rem* actions. Many years later, in the course of deciding *Cope* v. *Anderson,* 331 U. S. 461, this Court, in compelling language, pointed out: "For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located, 28 U. S. C. § 41 (16), and in that district alone can it be sued. 12 U. S. C. § 94." 331 U. S., at 467.

[12] "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in

Thus, we find nothing in the statute, its history or the cases in this Court to support appellee's construction of this statute. On the contrary, all these sources convince us that the statute must be given a mandatory reading.[13]

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their business that might result from their books being sent to distant counties in obedience to process from state courts. *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 394; *Crocker* v. *Marine National Bank*, 101 Mass. 200 [240]. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defence upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking asssociation to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defence without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary." 132 U. S., at 145.

[13] The lower federal courts have been unanimous in holding the section fully effective and mandatory. *Buffum* v. *Chase Nat. Bank*, 192 F. 2d 58 (C. A. 7th Cir. 1951), cert. denied, 342 U. S. 944; *Leonardi* v. *Chase Nat. Bank*, 81 F. 2d 19 (C. A. 2d Cir. 1936), cert. denied, 298 U. S. 677; *International Refugee Organization* v. *Bank of America*, 86 F. Supp. 884 (S. D. N. Y. 1949); *Schmitt* v. *Tobin*, 15 F. Supp. 35 (D. Nev. 1935); *Cadle* v. *Tracy*, 4 Fed. Cas. 967, No. 2279 (C. C. S. D. N. Y. 1873).

The state courts considering the problem are about evenly divided. Some hold that a national bank must be sued in the county where it

The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action in the state courts if they are located in different counties or in the federal courts if they are located in different districts. But aside from not being presented by these cases, such a situation is a matter for Congress to consider. Cf. 28 U. S. C. §§ 1391 (a), (b), 1401; *Greenberg* v. *Giannini,* 140 F. 2d 550, 552 (C. A. 2d Cir.). See also, *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379, 384.

Similarly, even if all of the 145 defendants may not be sued in one proceeding in Dallas County with the same facility as they may in Travis County, this, of course, is insufficient basis for departing from the command of the

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is situated, *Monarch Wine Co.* v. *Butte,* 113 Cal. App. 2d 833, 249 P. 2d 291 (1952); *Crocker* v. *Marine Nat. Bank,* 101 Mass. 240 (1869); *Rabinowitz* v. *Kaiser-Frazer Corp.,* 198 Misc. 312, 96 N. Y. S. 2d 638 (Sup. Ct. 1950); *Raiola* v. *Los Angeles Bank,* 133 Misc. 630, 233 N. Y. Supp. 301 (Sup. Ct. 1929); *Burns* v. *Northwestern Nat. Bank,* 65 N. D. 473, 260 N. W. 253 (1935); *Zarbell* v. *Bank of America Nat. Trust & Savings Assn.,* 52 Wash. 2d 549, 327 P. 2d 436 (1958). Others hold that there is no such requirement on the theory that § 57 of the 1864 Banking Act was impliedly repealed, *Fresno Nat. Bank* v. *Superior Court,* 83 Cal. 491, 24 P. 157 (1890); *Levitan* v. *Houghton Nat. Bank,* 174 Mich. 566, 140 N. W. 1019 (1913); *De Cock* v. *O'Connell,* 188 Minn. 228, 246 N. W. 885 (1933); *Stewart* v. *First Nat. Bank,* 93 Mont. 390, 18 P. 2d 801 (1933); *Guerra* v. *Lemburg,* 22 S. W. 2d 336 (Tex. Civ. 1929); *Brust* v. *First Nat. Bank,* 184 Wis. 15, 198 N. W. 749 (1924), or that the section is to be given a permissive construction, *First Nat. Bank* v. *Alston,* 231 Ala. 348, 165 So. 241 (Ala. 1936); *Hills* v. *Burnett,* 172 Neb. 370, 109 N. W. 2d 739 (Neb. 1961); *Talmage* v. *Third Nat. Bank,* 91 N. Y. 531 (1883); *Curlee* v. *National Bank,* 187 N. C. 119, 121 S. E. 194 (1924). See also *County of Okeechobee* v. *Florida Nat. Bank,* 112 Fla. 309, 150 So. 124 (1933); *Cassatt* v. *First Nat. Bank,* 9 N. J. Misc. 222, 153 A. 377 (Sup. Ct. 1931); *Chaffee* v. *Glens Falls Nat. Bank & Trust Co.,* 204 Misc. 181; 123 N. Y. S. 2d 635 (Sup. Ct. 1953), aff'd, 283 App. Div. 793, 128 N. Y. S. 2d 539, appeal denied, 129 N. Y. S. 2d 237.

federal statute. Nevertheless, though we have no intention of venturing an opinion on matters of Texas procedure, particularly when the parties were in disagreement about them in argument before this Court, we are aware of the recent ruling of the Texas Supreme Court, *Langdeau* v. *Burke Investment Co.*, — Tex. —, 358 S. W. 2d 553, holding Texas Insurance Code, Art. 21.28 (4), permissive, not mandatory, thus not restricting the receiver to suits in the receivership court. We have also noted that Texas procedural rules might very well permit the transfer of the entire case to Dallas County. Tex. Rules Civ. Proc. 89; [14] *Tunstill* v. *Scott*, 138 Tex. 425, 160 S. W. 2d 65; *Terrell* v. *Kohler*, 48 S. W. 2d 531 (Tex. Civ. App.). Moreover, Tex. Rules Civ. Proc. 164 [15] appears to permit dismissal of suits without prejudice when a plea of improper venue is sustained, see *Luck* v. *Welch*, 243 S. W. 2d 589 (Tex. Civ. App., ref. n. r. e.); *Wiley* v. *Joiner*, 223 S. W. 2d 539 (Tex. Civ. App.), opening the way for a new suit which Article 1995 (4) [16] indicates could be brought in Dallas County.[17]

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[14] "*Transferred if Plea Is Sustained.*

"If a plea of privilege is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court . . . ." Tex. Rules Civ. Proc. 89 (Vernon 1955).

[15] "*Non-Suit.*

"At any time before the jury has retired, the plaintiff may take a non-suit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief. When the case is tried by the judge, such non-suit may be taken at any time before the decision is announced." Tex. Rules Civ. Proc. 164 (Vernon 1955).

[16] "*Venue, general rule*

. . . . . .

"4. Defendants in different counties.—If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides." Art. 1995 (4), Tex. Rev. Civ. Stat. (Vernon 1950).

[17] To be sure, Texas law does not permit frivolous joinder of defendants to insure a desired venue, see *Stockyards Nat. Bank* v. *Maples*,

Appellee, finally, attempts to avoid his venue problem entirely by denying the very existence of § 5198, Rev. Stat. (1878). Section 5198, appellee says, was repealed by the proviso to § 4 of the Act of July 12, 1882:

> "[T]he jurisdiction for suits hereafter brought by or against any association . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . . And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." [18]

It is also said that 28 U. S. C. § 1348,[19] derived from the Act of March 3, 1887,[20] re-enacts § 4 of the 1882 Act, in somewhat modified form, thus continuing the congressional intent to repeal § 5198 to the extent that it prescribes the venue of suits in state courts. See 161 Tex., at 356, 341 S. W. 2d, at 166.

Since § 4 of the Act of 1882 and its successors do not expressly repeal § 5198, appellee's contention is necessarily one of implied repeal requiring some manifest inconsistency or positive repugnance between the two statutes. *United States* v. *Borden Co.*, 308 U. S. 188, 198–199. We find neither here. Section 5198, as construed in the *Charlotte Nat. Bank* case, is essentially a venue statute governing the proper location of suits against national banks in either federal or state courts, whereas § 4 of the 1882 Act and the 1887 Act were designed to

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127 Tex. 633, 95 S. W. 2d 1300, but nothing before us indicates that appellee will find any difficulty in sustaining his burden to establish that the defendant national banks are residents of Dallas County and that, as he alleges, his cause of action against them has a substantial and valid basis.

[18] See Appendix, No. 6. See note 13, *supra*, for state cases which have reached the same conclusion.

[19] See Appendix, No. 8.

[20] See Appendix, No. 7.

overcome the effect of §§ 563 and 629 Rev. Stat.[21] which allowed national banks to sue and be sued in the federal district and circuit courts solely because they were national banks, without regard to diversity, amount in controversy or the existence of a federal question in the usual sense. Section 4 apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited.[22]

Decisions of this Court have recognized that § 4 purported to deal with no more than matters of federal jurisdiction. As we observed in *Continental National Bank* v. *Buford*, 191 U. S. 119, 123–124:

> "The necessary effect of this legislation was to make national banks . . . citizens of the States in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the Circuit Courts of the United States simply on the ground that they were created by and exercised their powers under acts of Congress. No other purpose can be imputed to Congress than to effect that result."

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[21] See Appendix, No. 5.

[22] The proviso to § 4 of the 1882 Act first appeared as an amendment offered on the floor of the House by Representative Hammond, pursuant to the order of the House fixing the assignment of the bill H. R. 4167 as a special order. See 13 Cong. Rec. 3900, 3901. Mr. Hammond succinctly stated the purpose of his amendment as follows: "My amendment, therefore, declares that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank actually doing or which might be doing business by its side; that they shall be one and the same." 13 Cong. Rec., at 4049. Mr. Robinson then asked, "As I understand the gentleman's proposed amendment, it is simply to this effect, that a national bank doing business within a certain State shall be subject for all purposes of jurisdiction to precisely the same regulations to which a State bank, if organized there, would be subject." Mr. Hammond replied, "That is all." *Ibid.*

See also *Leather Manufacturers' Bank* v. *Cooper,* 120 U. S. 778. Moreover, nothing in the subsequent history of this statute, now 28 U. S. C. § 1348, warrants the conclusion that Congress sought, even by implication, to relax the venue restrictions of § 5198.

The provisions of § 5198 are fully effective and must be recognized when they are duly raised. The judgments of the Texas Supreme Court are reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, while agreeing with the Court that the judgments are "final," dissent on the merits of the controversy.

MR. JUSTICE CLARK took no part in the consideration or decision of these cases.

[For dissenting opinion of MR. JUSTICE HARLAN, see *post,* p. 572.]

APPENDIX TO OPINION OF THE COURT.

1. The Act of February 25, 1863, c. 58:

"SEC. 11. *And be it further enacted,* That every association formed pursuant to the provisions of this act may make and use a common seal, and shall have succession by the name designated in its articles of association and for the period limited therein, not, however, exceeding twenty years from the passage of this act; by such name may make contracts, sue and be sued, complain and defend in any court of law or equity as fully as natural persons . . . ." 12 Stat. 668.

"SEC. 59. *And be it further enacted,* That suits, actions, and proceedings by and against any associa-

tion under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established." 12 Stat. 681.

2. The Act of June 3, 1864, c. 106:

"SEC. 8. . . . Such association . . . may make contracts, sue and be sued, complain and defend, in any court of law and equity as fully as natural persons." 13 Stat. 101; Rev. Stat. § 5136 (1873).

"SEC. 57. . . . That suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however,* That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." 13 Stat. 116–117.

3. Section 57 was omitted from Title 62, National Banks, in the Revised Statutes of 1873. It was added to § 5198 of Title 62, National Banks, by the Act of February 18, 1875, c. 80, 18 Stat. 320. Section 5198, as amended, reads as follows:

"SEC. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal repre-

sentatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. *That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.*" (Amendment in italics.)

4. The portion of § 5198, Rev. Stat. (1878), relating to suits in federal and state courts, derived from § 57 of the 1864 Act, now appears as 12 U. S. C. § 94:

"§ 94. Venue of suits.

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Title 12 has not as yet been enacted into positive law.

5. Revised Statutes of 1873, Title 13, The Judiciary, c. 3, District Courts—Jurisdiction.

"SEC. 563. the district courts shall have jurisdiction as follows: . . . Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held."

Revised Statutes of 1873, Title 13, The Judiciary, c. 7, Circuit Court—Jurisdiction.

"SEC. 629. The circuit courts shall have original jurisdiction as follows: . . . Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations."

These provisions were derived from that part of § 57 of the 1864 Act which conferred jurisdiction on the federal courts.

6. Act of July 12, 1882, c. 290, 22 Stat. 162, an Act to enable national banking associations to extend their corporate existence, and for other purposes. Section 4 of that Act contained the following proviso:

". . . *Provided, however,* That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." [1] 22 Stat. 163.

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[1] The proviso to § 4 of the Act of 1882 is included in the Supplement to the Revised Statutes at 354 (2d ed. 1891), despite the apparent duplication of the Acts of 1887 and 1888, appearing at 614. It does not appear in the 1925 United States Code, the first official restatement since 1878 of all United States statutes presumptively in effect, evidently because the Committee on Revision cited the entire 1882 Act as repealed, 44 Stat. 1833, by the Act of July 1, 1922, c. 257, § 2, 42 Stat. 767. When the 1948 codification of Title 28 was enacted, the proviso to § 4 of the Act of 1882 was expressly repealed. 62 Stat. 992, § 39 (1948).

7. Act of March 3, 1887, c. 373, as amended by the Act of August 13, 1888, c. 866.

"SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." [2] 25 Stat. 436.

8. 28 U. S. C. § 1348 contains the present version of the matters covered in the Acts of 1882, 1887 and 1888:

"§ 1348. Banking association as party.

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

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[2] The Acts of 1887 and 1888 were repealed when the 1911 codification of the judiciary and judicial procedure provisions was enacted. Act of March 3, 1911, c. 231, § 297, 36 Stat. 1168. These provisions became § 24 of the Judicial Code of 1911, 28 U. S. C. (1940 ed.) § 41 (16), and then § 1348 of Title 28 enacted in 1948.

> "All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

MR. JUSTICE HARLAN, dissenting.

The Court's opinion in these appeals, and some of the things said in *Construction Laborers* v. *Curry, ante,* p. 542, cut deeply into the statutory requirement of "finality" limiting our jurisdiction to review state court judgments.[1]

That requirement is more than a technical rule of procedure, yielding when need be to the exigencies of particular situations. Rather, it is a long-standing and healthy federal policy that protects litigants and courts from the disruptions of piecemeal review and forecloses this Court from passing on constitutional issues that may be dissipated by the final outcome of a case, thus helping to keep to a minimum undesirable federal-state conflicts. In this instance it precludes, in my opinion, the exercise of our appellate jurisdiction at this stage of the proceedings.

The state court judgments now sought to be reviewed are nothing more than a determination that venue was properly laid in the county where suit against these appellants was brought. Such a determination, being tantamount to a denial of a motion to dismiss, is a classic example of an interlocutory ruling that is only a step towards ultimate disposition and is not in itself reviewable as a final judgment. See *Catlin* v. *United States,* 324 U. S. 229; 6 Moore, Federal Practice ¶¶ 54.12 (1), 54.14; see also *Clinton Foods* v. *United States,* 188 F. 2d 289, 291–

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[1] 28 U. S. C. § 1257 limits the appellate jurisdiction of this Court to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

292, and cases cited therein.[2] It fits squarely within the general rule that a judgment is not final unless it terminates the litigation and leaves nothing to be done but to enforce by execution what has been demanded. See *Parr* v. *United States,* 351 U. S. 513.

It is true that several specific, and narrowly circumscribed, exceptions to this general rule have been developed in order to deal with extraordinary situations where a judgment is final in substance although not in form. But these appeals do not fall within any of these exceptions.

Thus this is not a situation in which what remains to be done in the state courts is a mere formality, or in which the appellants concede that their whole case must stand or fall on the federal claim. Compare *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69; *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379; *Construction Laborers* v. *Curry, ante,* p. 542. Quite the contrary, appellants vigorously deny their liability on the merits of the appellee's claim.

Nor are these appeals like *Radio Station WOW* v. *Johnson,* 326 U. S. 120, where the challenged order required an immediate transfer of property, and where the remaining matters left to be disposed of in the state court were wholly unrelated, would almost certainly have raised no federal question, *and* could not have mooted the question sought to be reviewed. Here, a victory for appellants on the merits would clearly moot the federal question before us today. "It is of course not our province to discourage appeals. But for the soundest of reasons we

[2] As the Court stated in the *Catlin* case, 324 U. S., at 236: "[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. . . . Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation . . . ."

ought not to pass on constitutional issues before they have reached a definitive stop." *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 71.

On the other hand, if appellants lost on the merits, the venue question raised in the present appeals would then be open for review by this Court. Hence the controversy is wholly different from *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 546, where the challenged order would not have been merged in the final judgment and where, unless immediate review had been granted, no appellate determination of the right claimed could ever have been obtained.

Failing to come within any of these limited exceptions, appellants fall back on the familiar assertion that they should not be subjected to a burdensome trial in the wrong forum, a claim which the Court finds compelling. But surely such a claim cannot be accepted, for there is a large variety of situations in which a ruling on a preliminary matter will determine whether or not the case is to continue; yet a decision that does not definitively terminate the case is plainly not final. To rely on the hardship of being subjected to trial is to do away with the distinction between interlocutory and final orders. It is for this reason that the Court has always held that the hazard of being subjected to trial does not invest a preliminary ruling with the finality requisite to appeal. *E. g., Parr* v. *United States,* 351 U. S. 513, 519–520.

This is not a case of first impression. In *Cincinnati Street R. Co.* v. *Snell,* 179 U. S. 395, the railway company sought to appeal from a determination by the highest court of the State directing a change of venue and remanding the case for further proceedings. The railway company contended that the state law under which the change of venue had been ordered was unconstitutional. The case is thus squarely in point, since the appellants here are also challenging the constitutionality of the appli-

cation of local venue provisions. This Court unanimously dismissed the writ of error for lack of finality, stating:

> "It is true that the order appealed from finally adjudges that a change of venue should have been allowed; but the same comment may be made upon dozens of interlocutory orders made in the progress of a cause. Indeed, scarcely an order is imaginable which does not finally dispose of some particular point arising in the case; but that does not justify a review of such order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to a cause, it might in some cases require a dozen writs of error to dispose finally of the case." 179 U. S. at 397.

The *Cincinnati* case also shows the invalidity of the argument of these appellants that they may be spared a trial if their venue claim is presently sustained. For the Court in *Cincinnati* was unmoved by the circumstance that the railway company there had already won a jury verdict which had been set aside by the state court because of faulty venue. *A fortiori,* in a proceeding where the action has not yet been tried, the Court should be deaf to the similar claims of these appellants.

The Court's decision in these appeals throws the law of finality into a state of great uncertainty and will, I am afraid, tend to increase future efforts at piecemeal review.[3]

These appeals should be dismissed.

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[3] The Court appears to suggest that these appeals are unique because the decisions were appealable under state law and because national banks are making a substantial claim of a conflict between a federal and a state statute. But I fail to see how the appealability of interlocutory orders under state law, the identity of the appellants, or the substantiality of the federal claim asserted can have any bearing on whether the judgments appealed from are final.

STUART ET AL. *v.* WILSON, ATTORNEY GENERAL OF TEXAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 543. Decided January 21, 1963.

211 F. Supp. 700, affirmed.

James L. McNees, Jr. for appellants.

Will Wilson, Attorney General of Texas, *Sam R. Wilson,* Assistant Attorney General, and *Tom I. McFarling,* Special Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

BARDY *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 603. Decided January 21, 1963.

Appeal dismissed.

Morton R. Galane for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel and *Irwin A. Seibel* for the United States, and *Albert C. Bickford* for MCA Inc., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed.

MISSOURI EX REL. JOHNSON, ADMINISTRATRIX, ET AL. *v.* CLAY, SUPERINTENDENT OF DIVISION OF INSURANCE, ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 607. Decided January 21, 1963.

Appeal dismissed and certiorari denied.
Reported below: 359 S. W. 2d 790.

Walter A. Raymond for appellants.

Thomas F. Eagleton, Attorney General of Missouri, *Harry H. Kay*, Special Assistant Attorney General, and *John C. Baumann* for Clay, and *James M. Douglas* and *William G. Guerri* for Aetna Insurance Co., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BENDIX CORPORATION *v.* RADIO POSITION FINDING CORP.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 645. Decided January 21, 1963.

205 F. Supp. 850, affirmed.

Edward S. Irons and *Harold J. Birch* for appellant.

William D. Hall for appellee.

PER CURIAM.

The judgment is affirmed.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 577 and 801 were purposely omitted, in order to make it possible to publish the orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM END OF OCTOBER TERM, 1961, THROUGH JANUARY 21, 1963.

Cases Dismissed in Vacation.

No. 66, Misc. Lentz *v.* United States. On petition for writ of certiorari to the Court of Claims. July 24, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 85. Wade et al. *v.* Union Carbide & Carbon Corp. et al. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. August 2, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. *Joseph L. Alioto, Maxwell Keith* and *Richard Saveri* for petitioners. Reported below: 300 F. 2d 561.

No. 101. Seiberling Rubber Co. *v.* United States. On petition for writ of certiorari to the Court of Claims. August 10, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. *Edward C. Park* for petitioner. *Solicitor General Cox* for the United States. Reported below: 156 Ct. Cl. —, 297 F. 2d 842.

No. 117. Peerless Weighing & Vending Machine Corp. *v.* Public Building Commission of Chicago. Appeal from the United States District Court for the Northern District of Illinois. August 22, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. *Louis M. Mantynband, Sidney R. Zatz* and *Edward J. Hladis* for appellant. *William R. Dillon* for appellee. Reported below: 209 F. Supp. 877.

No. 268, Misc. HOLMES *v.* MISSISSIPPI SHIPPING CO., INC. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. August 23, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. *Samuel C. Gainsburgh* and *Raymond H. Kierr* for petitioner. Reported below: 301 F. 2d 474.

No. 311. SIDELL ET AL. *v.* HILL. On petition for writ of certiorari to the Court of Appeals of Kentucky. August 29, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. *Jerome M. Alper* for petitioners. Reported below: 357 S. W. 2d 318.

No. 106. SCHENLEY DISTILLERS, INC., *v.* JOHN P. DANT DISTILLERY CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. September 7, 1962. Dismissed pursuant to Rule 60 of the Rules of this Court. *Milton Handler, Sidney A. Diamond* and *Ben F. Washer* for petitioner. *Oldham Clarke* for respondents. Reported below: 297 F. 2d 935.

OCTOBER 1, 1962.

Assignment Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 15, 1962, and ending June 30, 1963, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE BURTON (retired) to perform judicial duties in the United States Court of Appeals for the Dis-

trict of Columbia Circuit beginning October 1, 1962, and ending June 30, 1963, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

October 8, 1962.*

Miscellaneous Orders.

No. 282, October Term, 1961. Atlantic & Gulf Stevedores, Inc., *v.* Ellerman Lines, Ltd., et al., 369 U. S. 355, rehearing denied, 369 U. S. 882. The motion of respondents to recall and amend the judgment is denied. Mr. Justice White took no part in the consideration or decision of this motion. *T. E. Byrne, Jr.* for respondents. *Francis E. Marshall* for petitioner.

No. 7, Misc., October Term, 1961. Harvey, alias McCargo, *v.* Cunningham, Penitentiary Superintendent, 369 U. S. 152; and

No. 63, October Term, 1961. Chewning *v.* Cunningham, Penitentiary Superintendent, 368 U. S. 443. The motions of petitioners to clarify opinions and for other relief are denied. Mr. Justice White took no part in the consideration or decision of these motions. Petitioners *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

No. 573, Misc. In re Disbarment of Brodstein. It is Ordered that Ellis Brodstein, of Reading, Pennsylvania, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

*Mr. Justice Goldberg took no part in the consideration or decision of cases in which orders were this day announced.

No. 12, Original. HAWAII *v.* BELL. The motion for leave to file bill of complaint is granted and the United States is allowed sixty days to answer. MR. JUSTICE WHITE took no part in the consideration or decision of this motion. *Shiro Kashiwa,* Attorney General of Hawaii, *Wilbur K. Watkins, Jr.,* Deputy Attorney General, *Thurman Arnold, Abe Fortas, Paul A. Porter* and *Dennis G. Lyons* for plaintiff. *Solicitor General Cox, Wayne G. Barnett, David R. Warner* and *Thos. L. McKevitt* for defendant.

No. 33. INCRES STEAMSHIP CO., LTD., *v.* INTERNATIONAL MARITIME WORKERS UNION ET AL. Certiorari, 368 U. S. 924, to the Court of Appeals of New York. The motions of the Republic of Panama; Government of the United Kingdom of Great Britain and Northern Ireland; and Seafarers' International Union of North America, Atlantic & Gulf District, AFL–CIO, for leave to file briefs, as *amici curiae,* are granted. *Herbert Brownell* and *Jack P. Jefferies* on the motion for the Republic of Panama. *Lawrence Hunt* on the motion for the Government of the United Kingdom of Great Britain and Northern Ireland. *Paul Barker* and *Neal Rutledge* on the motion for the Seafarers' International Union of North America, Atlantic & Gulf District, AFL–CIO.

No. 78. PEARLMAN, TRUSTEE IN BANKRUPTCY, *v.* RELIANCE INSURANCE CO. Certiorari, 369 U. S. 847, to the United States Court of Appeals for the Second Circuit. The motions of the Association of Casualty and Surety Companies and Edward M. Murphy for leave to file briefs, as *amici curiae,* are granted. *David Morgulas* for the Association of Casualty and Surety Companies, and *Edward M. Murphy, pro se,* on the motions.

No. 57. CLEARY *v.* BOLGER. Certiorari, 368 U. S. 984, to the United States Court of Appeals for the Second Circuit. The motion of respondent for the appointment of counsel is granted, and it is ordered that *Joseph Aronstein, Esquire,* of New York, New York, be, and he is hereby, appointed to serve as counsel for the respondent in this case.

No. 82. NEW YORK CENTRAL RAILROAD CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. (Probable jurisdiction noted, 370 U. S. 902.) Upon the suggestion of mootness, the judgment of the United States District Court for the Southern District of New York is vacated and the case is remanded with directions to dismiss the complaint. *Kenneth H. Lundmark* on the motion by appellant to dismiss appeal. *Solicitor General Cox* and *Robert W. Ginnane* for the United States et al. on the memorandum in response.

No. 88. NATIONAL LABOR RELATIONS BOARD *v.* RELIANCE FUEL OIL CORP. Certiorari, 369 U. S. 883, to the United States Court of Appeals for the Second Circuit. The motion of Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation Maintenance Servicemen and Helpers, Local Union 553, to be named a party petitioner is denied. *Samuel J. Cohen* on the motion. *Solicitor General Cox* for petitioner, in opposition.

No. 201. DRAPER ET AL. *v.* WASHINGTON ET AL. Certiorari, 370 U. S. 935, to the Supreme Court of Washington. The motion for the appointment of counsel is granted and it is ordered that *Charles F. Luce, Esquire,* of Portland, Oregon, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioners in this case.

No. 202. SANDERS *v.* UNITED STATES. Certiorari, 370 U. S. 936, to the United States Court of Appeals for the Ninth Circuit. The motion for the appointment of counsel is granted and it is ordered that *Fred M. Vinson, Jr., Esquire,* of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 172, Misc. WEINFURTNER *v.* CALIFORNIA ET AL.;

No. 175, Misc. KELLEY *v.* ROYSTER, STATE FARM SUPERINTENDENT, ET AL.;

No. 212, Misc. DONALDSON *v.* FLORIDA ET AL.;

No. 234, Misc. SCHNEIDER-JIMENEZ *v.* HERITAGE, WARDEN;

No. 246, Misc. TOMKALSKI *v.* MAXWELL, WARDEN, ET AL.;

No. 256, Misc. EX PARTE SCHLETTE;

No. 262, Misc. MELENDEZ *v.* HERITAGE, WARDEN;

No. 287, Misc. BROWNING *v.* KANSAS ET AL.;

No. 332, Misc. CASTRO *v.* KLINGER, PRISON SUPERINTENDENT;

No. 347, Misc. ORTIZ *v.* HERITAGE, WARDEN;

No. 355, Misc. WHITE *v.* CONBOY, WARDEN, ET AL.;

No. 373, Misc. REYES *v.* HERITAGE, WARDEN;

No. 391, Misc. SCARANO *v.* REINCKE, WARDEN;

No. 396, Misc. MCCALL *v.* MCDONALD, SHERIFF;

No. 397, Misc. CREAGH *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL.;

No. 422, Misc. BRAY *v.* UNITED STATES;

No. 427, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.; and

No. 450, Misc. MUZA *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 206, Misc. IN RE HARPER;

No. 423, Misc. EX PARTE KUMITIS; and

No. 438, Misc. GARDNER *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 156, Misc. GATELY *v.* SUTTON ET AL., JUSTICES OF THE SUPREME COURT OF COLORADO;

No. 201, Misc. WILSON *v.* HALBERT, U. S. DISTRICT JUDGE, ET AL.; and

No. 225, Misc. STEPHENS *v.* BOLDT, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 142. SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL. *v.* SCHEMPP ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. Probable jurisdiction noted. *David Stahl,* Attorney General of Pennsylvania, *John D. Killian III,* Deputy Attorney General, *Percival R. Rieder, C. Brewster Rhoads* and *Philip H. Ward III* for appellants. Reported below: 201 F. Supp. 815.

No. 111. FERGUSON, ATTORNEY GENERAL OF KANSAS, ET AL. *v.* SKRUPA, DOING BUSINESS AS CREDIT ADVISORS. Appeal from the United States District Court for the District of Kansas. Probable jurisdiction noted. *William M. Ferguson,* Attorney General of Kansas, for appellants. *Lawrence Weigand* for appellee. Reported below: 210 F. Supp. 200.

No. 108. INTERSTATE COMMERCE COMMISSION *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.;

No. 109. SEA-LAND SERVICE, INC., *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.;

No. 110. SEATRAIN LINES, INC., *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.; and

No. 125. UNITED STATES *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. Appeals from the United States District Court for the District of Connecticut. Probable jurisdiction noted. *Robert W. Ginnane* and *B. Franklin Taylor, Jr.* for appellant in No. 108. *Warren Price, Jr.* for appellant in No. 109. *Ralph D. Ray* and *Warren E. Baker* for appellant in No. 110. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum* for the United States in No. 125. *Carl Helmetag, Jr., James A. Bistline, Ernest D. Grinnell, Jr., J. Edgar McDonald, Charles P. Reynolds, Albert B. Russ, Jr.* and *Toll R. Ware* for appellees. Reported below: 199 F. Supp. 635.

No. 164. JACOBELLIS *v.* OHIO. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. *Ephraim London* for appellant. *John T. Corrigan* for appellee. Reported below: 173 Ohio St. 22, 179 N. E. 2d 777.

Certiorari Granted. (*See also No. 98, Misc., ante, p. 17.*)

No. 150. SILVER, DOING BUSINESS AS MUNICIPAL SECURITIES CO., ET AL. *v.* NEW YORK STOCK EXCHANGE. C. A. 2d Cir. Certiorari granted. *David I. Shapiro* for petitioners. *A. Donald MacKinnon* for respondent. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum* and *Melvin Spaeth* for the United States, as *amicus curiae*, in support of the petition. Reported below: 302 F. 2d 714.

No. 119. MURRAY ET AL. *v.* CURLETT ET AL., CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY. Court of Appeals of Maryland. Certiorari granted. *Leonard J. Kerpelman* for petitioners. *Francis B. Burch* and *Philip Z. Altfeld* for respondents. *Thomas B. Finan,* Attorney General of Maryland, and *James P. Garland* and *Robert F. Sweeney,* Assistant Attorneys General, for the State of Maryland, as *amicus curiae,* in opposition. Reported below: 228 Md. 239, 179 A. 2d 698.

No. 146. COLORADO ANTI-DISCRIMINATION COMMISSION ET AL. *v.* CONTINENTAL AIR LINES, INC.; and

No. 68, Misc. GREEN *v.* CONTINENTAL AIR LINES, INC. On petitions for writs of certiorari to the Supreme Court of Colorado. The petition for writ of certiorari in No. 146 is granted. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari in No. 68, Misc., are also granted and the case is transferred to the appellate docket. *Duke W. Dunbar,* Attorney General of Colorado, and *Floyd B. Engeman,* Assistant Attorney General, for petitioners in No. 146. *T. Raber Taylor* for petitioner in No. 68, Misc. *Patrick M. Westfeldt* for respondent in both cases. A memorandum for the United States, as *amicus curiae,* in support of the petitions in both cases was filed by *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin.* Brief of *amici curiae* in support of the petition in No. 146 was filed by *Stanley Mosk,* Attorney General of California, *Howard H. Jewel,* Assistant Attorney General, *Victor D. Sonenberg,* Deputy Attorney General, and *Charles E. Wilson* for the State of California, and *Thomas F. Eagleton,* Attorney General of Missouri, and *James J. Murphy,* Assistant Attorney General, for the State of Missouri. Reported below: 149 Colo. 259, 368 P. 2d 970.

No. 178. STATE TAX COMMISSION OF UTAH *v.* PACIFIC STATES CAST IRON PIPE CO. Supreme Court of Utah. Certiorari granted. *A. Pratt Kesler,* Attorney General of Utah, and *F. Burton Howard,* Assistant Attorney General, for petitioner. *C. M. Gilmour* for respondent. Reported below: 13 Utah 2d 113, 369 P. 2d 123.

No. 180. GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION No. 89, ET AL. *v.* RISS & COMPANY, INC. C. A. 6th Cir. Certiorari granted. *David Previant, Herbert S. Thatcher* and *Ralph H. Logan* for petitioners. Reported below: 298 F. 2d 341.

No. 229. GUTIERREZ *v.* WATERMAN STEAMSHIP CORP. C. A. 1st Cir. Certiorari granted. *Harvey B. Nachman* for petitioner. *Antonio M. Bird* for respondent. Reported below: 301 F. 2d 415.

No. 240. MAXIMOV, TRUSTEE, *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *D. Nelson Adams* and *John A. Reed* for petitioner. *Solicitor General Cox* for the United States. Reported below: 299 F. 2d 565.

No. 271. DAVIS, TRUSTEE, *v.* SOJA, INTERNAL REVENUE AGENT. C. A. 7th Cir. Certiorari granted. *Walter J. Rockler* for petitioner. *Solicitor General Cox* for respondent. Reported below: 303 F. 2d 601.

No. 288. NATIONAL LABOR RELATIONS BOARD *v.* ERIE RESISTOR CORP. ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *John C. Bane, Jr.* for Erie Resistor Corp., and *Benjamin C. Sigal* and *David S. Davidson* for International Union of Electrical, Radio and Machine Workers, respondents. Reported below: 303 F. 2d 359.

No. 217. Goss et al. *v.* Board of Education of Knoxville, Tennessee, et al. The petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition, which reads as follows:

"Whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (Goss case), and Davidson County, Tennessee (Maxwell case), are deprived of rights under the Fourteenth Amendment by judicial approval of a provision in desegregation plans adopted by their local school boards, which expressly recognizes race as a ground for transfer between schools in circumstances where such transfers operate to preserve the pre-existing racially segregated system, and which operate to restrict Negroes living in the zones of all-Negro schools to such schools while permitting white children in such areas to transfer to other schools solely on the basis of race."

Jack Greenberg, James M. Nabrit III, Carl A. Cowan and *Z. Alexander Looby* for petitioners. *S. Frank Fowler* and *K. Harlan Dodson, Jr.* for respondents. Reported below: 301 F. 2d 164; 301 F. 2d 828.

No. 283. Lane, Warden, *v.* Brown. Motion of respondent for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. *Edwin K. Steers,* Attorney General of Indiana, and *William D. Ruckelshaus,* Assistant Attorney General, for petitioner. *Nathan Levy* for respondent. Reported below: 302 F. 2d 537.

No. 44, Misc. Downum *v.* United States. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals

for the Fifth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 300 F. 2d 137.

No. 47, Misc. BRADY *v.* MARYLAND. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Appeals of Maryland granted. Case transferred to the appellate docket. *John Martin Jones, Jr.* for petitioner. *Thomas B. Finan,* Attorney General of Maryland, and *Thomas W. Jamison III,* Assistant Attorney General, for respondent. Reported below: 226 Md. 422, 174 A. 2d 167.

No. 51, Misc. ANDREWS *v.* UNITED STATES; and
No. 217, Misc. DONOVAN *v.* UNITED STATES. Motions for leave to proceed *in forma pauperis* and petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit granted. Cases consolidated and transferred to the appellate docket. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 301 F. 2d 376.

No. 69, Misc. WHEELDIN ET AL. *v.* WHEELER. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to the appellate docket. In briefs and oral argument, counsel are directed to discuss the question of federal jurisdiction. *A. L. Wirin, Fred Okrand* and *Nanette Dembitz* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for respondent. Reported below: 302 F. 2d 36.

Certiorari Denied. (See also No. 100, ante, p. 7; No. 105, ante, p. 8; No. 122, ante, p. 11; No. 223, ante, p. 5; No. 237, ante, p. 13; No. 31, Misc., ante, p. 15; and Misc. Nos. 206, 423 and 438, ante, p. 807.)

No. 95. TECON CORPORATION *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *James R. Beverley* for petitioner. *Arturo Estrella,* Acting Solicitor General of Puerto Rico, and *Rodolfo Cruz Contreras,* Assistant Solicitor General, for respondent. Reported below: —— P. R. ——.

No. 127. MASSACHUSETTS BONDING & INSURANCE CO. *v.* DEBRAM. C. A. 5th Cir. Certiorari denied. *Henry B. Alsobrook, Jr.* for petitioner. *Raymond H. Kierr* for respondent. Reported below: 297 F. 2d 858.

No. 129. BRYAN *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Robert W. Stanley* for petitioner. *Roger D. Foley,* Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 78 Nev. 38, 368 P. 2d 672.

No. 131. ROBERT E. LEE & CO., INC., ET AL. *v.* VEATCH ET AL., DOING BUSINESS AS BLACK & VEATCH. C. A. 4th Cir. Certiorari denied. *Robert M. Hitch* for petitioners. *Wesley M. Walker* and *Fletcher C. Mann* for respondents. Reported below: 301 F. 2d 434.

No. 137. GENERAL MOTORS CORP. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Aloysius F. Power, Walter R. Frizzell* and *E. J. McGratty, Jr.* for petitioner. *Solicitor General Cox, Robert W. Ginnane* and *Arthur J. Cerra* for the United States and the Interstate Commerce Commission. *J. Edgar McDonald* for respondent railroads. Reported below: 299 F. 2d 233.

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No. 132. SAWYER *v.* PIONEER MILL CO., LTD., ET AL. C. A. 9th Cir. Certiorari denied. *Robert W. Kenny* for petitioner. *J. Russell Cades* and *Marion B. Plant* for respondents. Reported below: 300 F. 2d 200.

No. 135. ESSO STANDARD OIL CO. *v.* FALL, ADMINISTRATRIX. C. A. 5th Cir. Certiorari denied. *Walter X. Connor* and *Louis Kurz, Jr.* for petitioner. *William M. Alper* for respondent. Reported below: 297 F. 2d 411.

No. 138. PIERCE, EXECUTRIX, *v.* ALLEN B. DUMONT LABORATORIES, INC. C. A. 3d Cir. Certiorari denied. *Robert H. Rines, David Rines* and *Thomas Cooch* for petitioner. *Floyd H. Crews* and *Donald J. Overocker* for respondent. Reported below: 297 F. 2d 323.

No. 139. HENWOOD ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Solicitor General Cox, Peter A. Dammann* and *Walter P. North* for the Securities and Exchange Commission, and *Frank G. Raichle* for United Industrial Corp., respondents. Reported below: 298 F. 2d 641.

No. 149. HARLOW ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joel W. Westbrook* for petitioner Harlow. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 301 F. 2d 361.

No. 151. BANKERS TRUST CO. ET AL., EXECUTORS, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leonard M. Wallstein, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *John B. Jones, Jr.* for the United States. Reported below: 299 F. 2d 936.

No. 152. ROBINSON *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *Joseph Robbie* for petitioner. *Walter F. Mondale,* Attorney General of Minnesota, *Charles E. Houston,* Solicitor General, and *John P. Frank* for respondent. Reported below: 262 Minn. 79, 114 N. W. 2d 737.

No. 153. MEMPHIS TRANSIT CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *E. Roy Gilpin, Leslie J. Flower* and *Norton Kern* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 155 Ct. Cl. —, 297 F. 2d 542.

No. 154. RICHARDSON *v.* BRUNNER ET AL. Court of Appeals of Kentucky. Certiorari denied. *Frank E. Haddad, Jr.* and *Robert Hubbard* for petitioner. Reported below: 356 S. W. 2d 252.

No. 156. HOUSTON *v.* UNITED STATES. Court of Claims. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for the United States. Reported below: 156 Ct. Cl. —, 297 F. 2d 838.

No. 158. BUDGET DRESS CORP. *v.* JOINT BOARD OF DRESS & WAISTMAKERS' UNION OF GREATER NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *Morris J. Fellner* for petitioner. *Emil Schlesinger* and *Morris P. Glushien* for respondents. Reported below: 299 F. 2d 936.

No. 160. LA MAUR, INC., *v.* L. S. DONALDSON CO. ET AL. C. A. 8th Cir. Certiorari denied. *Benedict Deinard* for petitioner. *Dean Laurence* and *Herbert I. Sherman* for respondents. Reported below: 299 F. 2d 412.

No. 161. CONNECTICUT COMMITTEE AGAINST PAY TV ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Marcus Cohn* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Irwin A. Seibel, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the Federal Communications Commission, and *Harold David Cohen* and *W. Theodore Pierson* for RKO General Phonevision Co., respondents. Reported below: 112 U. S. App. D. C. 248, 301 F. 2d 835.

No. 166. FABIANICH ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Stanley M. Dietz* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 112 U. S. App. D. C. 319, 302 F. 2d 904.

No. 168. BONSALL ET AL. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. *Robert McHale* for petitioners. Reported below: 300 F. 2d 150.

No. 169. MADDOX *v.* FIDELITY INVESTMENT & TITLE CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. *Luther Robinson Maddox*, petitioner, *pro se*. Reported below: 300 F. 2d 1.

No. 171. DONOHUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Sydney M. Eisenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 302 F. 2d 663.

No. 176. BENSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Harry G. Fins* for petitioner. Reported below: 24 Ill. 2d 159, 180 N. E. 2d 483.

No. 173. MOUND COMPANY *v.* TEXAS COMPANY. C. A. 5th Cir. Certiorari denied. *John Leroy Jeffers* for petitioner. *Leon Jaworski* for respondent. Reported below: 298 F. 2d 905.

No. 179. ORGEL ET AL. *v.* CLARK BOARDMAN CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied. *James E. Birdsall* for petitioners. *Philip Wittenberg* and *Edward W. Stitt, Jr.* for respondents. Reported below: 301 F. 2d 119.

No. 181. LAKELAND GROCERY CORP. *v.* FOOD FAIR STORES, INC. C. A. 4th Cir. Certiorari denied. *William L. Parker* and *Norris E. Halpern* for petitioner. *Archibald G. Robertson* and *Lewis T. Booker* for respondent. Reported below: 301 F. 2d 156.

No. 183. GREEN TRUCK SALES, INC., *v.* HOEGH LINES. C. A. 9th Cir. Certiorari denied. *Francis J. Gabel* for petitioner. *L. Robert Wood* for respondent. Reported below: 298 F. 2d 240.

No. 184. BATTLES *v.* GOLDBERG, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. *Stanford Shmukler* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for respondent. Reported below: 299 F. 2d 937.

No. 185. GIBAS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 300 F. 2d 836.

No. 186. SOLOMON DEHYDRATING CO., INC., *v.* GUYTON. C. A. 8th Cir. Certiorari denied. *Joseph T. Votava* for petitioner. Reported below: 302 F. 2d 283.

No. 182. KERR'S CATERING SERVICE *v.* DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Robert E. Hannon* for petitioner. *Stanley Mosk,* Attorney General of California, and *B. Franklin Walker,* Deputy Attorney General, for respondents. Reported below: 57 Cal. 2d 319, 369 P. 2d 20.

No. 187. ISAACS ET AL. *v.* UNITED STATES;
No. 188. LARRICK *v.* UNITED STATES;
No. 189. JEFFORDS *v.* UNITED STATES; and
No. 194. OSSANNA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Benedict Deinard* and *Melvin H. Siegel* for petitioners in No. 187. *Robert J. King* for petitioner in No. 188. *John E. Wasche* for petitioner in No. 189. *James M. Landis* for petitioner in No. 194. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 301 F. 2d 706.

No. 190. KOVAC *v.* KOVAC. Supreme Court of Illinois. Certiorari denied. *Walter C. Wellman* for petitioner.

No. 199. BELL *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Benjamin H. Kizer* for petitioner. Reported below: 59 Wash. 2d 338, 368 P. 2d 177.

No. 207. ARLENE COATS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edwin J. McDermott* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for the United States. Reported below: 156 Ct. Cl. —, 297 F. 2d 546.

No. 192. Hi Hat Elkhorn Coal Co. *v.* Newman. C. A. 6th Cir. Certiorari denied. *Joe Hobson* for petitioner. *C. Kilmer Combs* for respondent. Reported below: 298 F. 2d 119; 302 F. 2d 723.

No. 193. Aetna Insurance Co. *v.* Vernon et al. C. A. 5th Cir. Certiorari denied. *David Bland* for petitioner. *William F. Walsh* for respondents. Reported below: 301 F. 2d 86.

No. 195. Woods *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *Howard T. Savage* for petitioner. Reported below: 24 Ill. 2d 154, 180 N. E. 2d 475.

No. 197. Wycoff Company, Inc., *v.* Public Service Commission of Utah et al. Supreme Court of Utah. Certiorari denied. *Zar E. Hayes* and *Calvin L. Rampton* for petitioner. *A. Pratt Kesler,* Attorney General of Utah, *Raymond W. Gee,* Assistant Attorney General, *Keith E. Sohm* and *Wood R. Worsley* for respondents. Reported below: 13 Utah 2d 123, 369 P. 2d 283.

No. 198. Pagano *v.* Sahn, Trustee in Bankruptcy. C. A. 2d Cir. Certiorari denied. *Vincent J. Velella* and *Morris Weissberg* for petitioner. *Harold L. Lipton* for respondent. Reported below: 302 F. 2d 629.

No. 203. Cardarella et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Walter A. Raymond* and *Kenneth C. West* for petitioners. *Solicitor General Cox* for the United States. Reported below: 302 F. 2d 95.

No. 204. Hackett *v.* United States. C. A. 6th Cir. Certiorari denied. *Albert A. Goldfarb* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 303 F. 2d 33.

No. 205. OZARK DAIRY CO. ET AL. *v.* ADAMS DAIRY CO. ET AL. C. A. 8th Cir. Certiorari denied. *J. L. London* for petitioners. *R. H. McRoberts, John H. Lashly, Paul B. Rava* and *J. Leonard Schermer* for respondents.

No. 208. SEXTON, EXECUTOR, *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Justin A. Stanley* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Morton K. Rothschild* for the United States. Reported below: 300 F. 2d 490.

No. 209. RICHARDSON ET AL., EXECUTORS, *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Daniel Mungall, Jr.* and *Lewis M. Stevens* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondent. Reported below: 301 F. 2d 305.

No. 210. THOMPSON *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *C. O. Pearson* for petitioner. *T. W. Bruton*, Attorney General of North Carolina, and *G. Andrew Jones, Jr.*, Assistant Attorney General, for respondent. Reported below: 256 N. C. 593, 124 S. E. 2d 728.

No. 214. JOSEPH L. O'BRIEN CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Francis T. Anderson* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Meyer Rothwacks* and *Morton K. Rothschild* for respondent. Reported below: 301 F. 2d 813.

No. 215. NORTHERN OHIO TELEPHONE CO. *v.* WARD. C. A. 6th Cir. Certiorari denied. *Sidney D. Griffith* for petitioner. *H. Guy Hardy* for respondent. Reported below: 300 F. 2d 816.

No. 211. CITIES SERVICE OIL CO. *v.* TOBRINER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George H. Colin* for petitioner. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondents. Reported below: 113 U. S. App. D. C. 145, 306 F. 2d 752.

No. 212. HENRY ET AL., DOING BUSINESS AS SUBURBAN BROADCASTERS, *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lester W. Spillane, Robert L. Heald* and *Edward F. Kenehan* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Max D. Paglin, Daniel R. Ohlbaum* and *Ernest O. Eisenberg* for respondent. Reported below: 112 U. S. App. D. C. 257, 302 F. 2d 191.

No. 213. NOBLE ET UX. *v.* DE VAS. Supreme Court of Utah. Certiorari denied. *Paul N. Cotro-Manes* for petitioners. Reported below: 13 Utah 2d 133, 369 P. 2d 290.

Nos. 219 and 220. BRIDGES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Hume Cofer* and *John D. Cofer* for petitioner. Reported below: —— Tex. Cr. R. ——, 360 S. W. 2d 531, 532.

No. 224. RHODES *v.* UNITED STATES. Court of Claims. Certiorari denied. *John P. Witsil* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 156 Ct. Cl. ——.

No. 226. DREDGE CORPORATION *v.* HUSITE COMPANY. Supreme Court of Nevada. Certiorari denied. *Abraham Marcus* and *George W. Nilsson* for petitioner. *H. Dale Murphy* for respondent. Reported below: 78 Nev. 69, 369 P. 2d 676.

No. 216. REAL ESTATE CORP., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *N. E. Snyder* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Myron C. Baum* and *Arthur I. Gould* for respondent. Reported below: 301 F. 2d 423.

No. 218. ZEH ET AL. *v.* AEROGLIDE CORPORATION. C. A. 2d Cir. Certiorari denied. *Reginald C. Smith* for petitioners. *Harold Harper* for respondent. Reported below: 301 F. 2d 420.

No. 231. RHODES *v.* STAR HERALD PRINTING CO. ET AL. Supreme Court of Nebraska. Certiorari denied. Reported below: 173 Neb. 496, 113 N. W. 2d 658.

No. 232. LIBERIAN CARRIERS, INC., ET AL. *v.* TAMPA SHIP REPAIR & DRY DOCK CO., INC. C. A. 2d Cir. Certiorari denied. *Richard H. Sommer* and *Edward L. Smith* for petitioners. *Nicholas J. Healy III* for respondent. Reported below: 301 F. 2d 462.

No. 234. TEXACO, INC., *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. *Milton Handler* and *Cecelia H. Goetz* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Elliott H. Moyer* and *James McI. Henderson* for respondent. Reported below: 301 F. 2d 662.

No. 238. GRAHAM *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Joseph S. Schuchert, Jr.* and *Paul Ginsburg* for petitioner.

No. 252. CLEMENT *v.* FISHER. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Charles E. Brown* for respondent. Reported below: 173 Ohio St. 220, 180 N. E. 2d 835.

No. 233. KAAKINEN ET AL. *v.* PEELERS COMPANY. C. A. 9th Cir. Certiorari denied. *Robert W. Beach* and *Paul L. O'Brien* for petitioners. *Ford E. Smith* and *A. Robert Theibault* for respondent. Reported below: 301 F. 2d 170.

No. 242. CARLSON *v.* DICKMAN ET AL. Supreme Court of Oregon. Certiorari denied. *Eugene Gressman, Randall B. Kester* and *Roy F. Shields* for petitioner. *Leo Pfeffer, Steve Anderson* and *John D. Mosser* for respondents. Reported below: 232 Ore. 238, 366 P. 2d 533.

No. 243. ESTATE OF RAU *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Ellsworth T. Simpson* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Robert N. Anderson* for respondent. Reported below: 301 F. 2d 51.

No. 244. MAMULA *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. *Harry Alan Sherman* for petitioner. *David E. Feller, Elliot Bredhoff, Jerry D. Anker* and *Ernest G. Nassar* for respondents. Reported below: 304 F. 2d 108.

Nos. 245 and 246. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 7th Cir. Certiorari denied. *Paul R. Conaghan* and *Richard B. Ogilvie* for petitioner. *Burke Williamson, Jack A. Williamson* and *John J. Naughton* for respondents. Reported below: 302 F. 2d 545; 302 F. 2d 540.

No. 254. NICHOLSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Harris Gilbert* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 303 F. 2d 330.

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No. 257. BREECE, ADMINISTRATRIX, *v.* J. F. CHAPMAN & SON, INC. C. A. 3d Cir. Certiorari denied. *William M. Feinberg* for petitioner. *John A. Ackerman* for respondent. Reported below: 302 F. 2d 581.

No. 258. ALEXANDER *v.* COUNTY BOARD OF ARLINGTON COUNTY ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Samuel W. Tucker* for petitioner. *William J. Hassan, Peter J. Kostik* and *James H. Simmonds* for respondents.

No. 259. HOLIDAY LODGE, INC., *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION. C. A. 7th Cir. Certiorari denied. *Morris S. Bromberg* and *Samuel E. Hirsch* for petitioner. *Edward Rothbart* for respondent. Reported below: 300 F. 2d 516.

No. 261. SOUTHERN FARMS, INC., *v.* GOLDBERG, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *Landman Teller* for petitioner. *Solicitor General Cox, Charles Donahue, Jacob I. Karro* and *Caruthers Gholson Berger* for respondent. Reported below: 301 F. 2d 130.

No. 263. AMERICAN NEWS CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Eugene Frederick Roth* and *Lester Lewis Jay* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel, James McI. Henderson* and *Miles J. Brown* for respondent. Reported below: 300 F. 2d 104.

No. 264. PENNSYLVANIA RAILROAD CO. *v.* GOWINS. C. A. 6th Cir. Certiorari denied. *Robert L. Barton* for petitioner. *C. Richard Grieser* for respondent. Reported below: 299 F. 2d 431.

No. 266. MONEM *v.* COSMOPOLITAN SHIPPING CO., INC., ET AL. Municipal Court of New York, New York, Borough of Manhattan, First District. Certiorari denied. *Jacob Rassner* for petitioner. *J. Ward O'Neill* and *Richard L. Maher* for respondents.

No. 268. MADDOX *v.* SHROYER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Luther Robinson Maddox*, petitioner, *pro se*. Reported below: 112 U. S. App. D. C. 318, 302 F. 2d 903.

No. 269. HUMBLE OIL & REFINING CO. *v.* MARTIN ET AL. C. A. 5th Cir. Certiorari denied. *M. M. Roberts* for petitioner. *Landman Teller* for respondents. Reported below: 298 F. 2d 163; 301 F. 2d 313.

No. 272. COHEN *v.* PLATEAU NATURAL GAS CO. ET AL. C. A. 10th Cir. Certiorari denied. *Nathan B. Kogan* and *David M. Palley* for petitioner. *Douglas Arant* and *Richard F. Mullins* for respondents. Reported below: 303 F. 2d 273.

No. 273. UNITED NEW YORK & NEW JERSEY SANDY HOOK PILOTS ASSOCIATION ET AL. *v.* HALECKI, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *Lawrence J. Mahoney* for petitioners. *Nathan Baker, Bernard Chazen* and *Milton Garber* for respondent. Reported below: 302 F. 2d 840.

No. 278. ROCK ISLAND MOTOR TRANSIT CO. *v.* CONDITIONED AIR CORP. Supreme Court of Iowa. Certiorari denied. *B. A. Webster, Jr.* and *Alden B. Howland* for petitioner. *Harris M. Coggeshall* for respondent. Reported below: 253 Iowa 961, 114 N. W. 2d 304.

No. 279. ANSPACH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Arthur Warner* and *S. Ward Sullivan* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 305 F. 2d 48.

No. 280. VOGELSANG ET AL., DOING BUSINESS AS WHITEHOUSE BROS., *v.* DELTA AIR LINES, INC. C. A. 2d Cir. Certiorari denied. *Simon Greenhill* for petitioners. *John M. Aherne* for respondent. Reported below: 302 F. 2d 709.

No. 281. LOCAL 776, I. A. T. S. E. (FILM EDITORS), *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Robert W. Gilbert* and *Louis A. Nissen* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 303 F. 2d 513.

No. 282. COLUMBUS PRODUCTION CREDIT ASSOCIATION *v.* BOWERS, TAX COMMISSIONER OF OHIO. Supreme Court of Ohio. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Oberdorfer, J. William Doolittle, Joseph Kovner* and *Paul O. Ritter* for petitioner. *Mark McElroy,* Attorney General of Ohio, *Theodore R. Saker,* First Assistant Attorney General, and *John Dilenschneider,* Assistant Attorney General, for respondent. Reported below: 173 Ohio St. 97, 180 N. E. 2d 1.

No. 284. UTAH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Ronald N. Boyce,* Assistant Attorney General of Utah, and *Dennis McCarthy* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 304 F. 2d 23.

No. 287. BENDIX CORPORATION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Allen S. Hubbard* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 299 F. 2d 308.

No. 289. ATLANTIC COAST LINE RAILROAD CO. *v.* SLAUGHTER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Prime F. Osborn, Norman C. Shepard* and *Frank G. Kurka* for petitioner. Reported below: 112 U. S. App. D. C. 327, 302 F. 2d 912.

No. 290. RICE LAKE CREAMERY CO. *v.* GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 662, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Clark M. Robertson* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for the National Labor Relations Board, respondent. Reported below: 112 U. S. App. D. C. 323, 302 F. 2d 908.

No. 294. COLLINS ET UX. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. McNeill* for petitioners. *Solicitor General Cox* and *Acting Assistant Attorney General Jones* for the United States. Reported below: 156 Ct. Cl. —, 299 F. 2d 949.

No. 295. MORRIS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Francis W. McCauley* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Joseph Kovner* for the United States. Reported below: 303 F. 2d 533.

No. 347. FAIR ET AL. *v.* MEREDITH. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands,* Assistant Attorney General, and *Peter M. Stockett, Jr.* and *Charles Clark,* Special Assistant Attorneys General, for petitioners. Reported below: 305 F. 2d 341, 343; 306 F. 2d 374.

No. 103. JOHNSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *T. K. Irwin, Jr.* for petitioner. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——.

No. 130. MATHIASEN TANKER INDUSTRIES, INC., *v.* MASON. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted in this case because the petitioning shipowner here has been denied its right to trial by jury guaranteed by the Seventh Amendment to the Constitution. *Harry E. McCoy* for petitioner. *Sidney H. Kelsey* for respondent. Reported below: 298 F. 2d 28.

No. 174. CHRISTIANI-ONKEN, ALIAS CHRISTIANI, *v.* KENNEDY, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *John W. Pehle* and *James H. Mann* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, John G. Laughlin, Jr.* and *Pauline B. Heller* for respondent. Reported below: 112 U. S. App. D. C. 222, 301 F. 2d 546.

No. 126. PORTER *v.* STANFORD, JUDGE. Supreme Court of Arizona. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this petition. *Stephen W. Langmade* for petitioner.

No. 136. PIERCE FORD SALES, INC., ET AL. *v.* FORD MOTOR CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK would grant certiorari in this case because he believes that petitioner Pierce Ford Sales, Inc., was denied its right to a trial by jury in violation of the guarantee of the Seventh Amendment. *John S. Burgess* for petitioners. *Whitney North Seymour, Osmer C. Fitts* and *Richard Hawkins* for respondent. Reported below: 299 F. 2d 425.

No. 143. YOUNG *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Max Kabatznick* and *Israel Bernstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 302 F. 2d 511.

No. 228. FREEDMAN ET AL. *v.* PHILADELPHIA TERMINALS AUCTION CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *David Berger* and *Walter Stein* for petitioners. *C. Brewster Rhoads* and *Thomas N. O'Neill, Jr.* for respondent. Reported below: 301 F. 2d 830.

No. 196. MORRIS ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Abe Krash* and *Harry Green* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States.

No. 145. GREENHILL ET AL. *v.* UNITED STATES. Motion of petitioners to vacate and remand denied. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Dudley Yoedicke, Eugene Gressman* and *Leon D. Hubert, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 298 F. 2d 405.

No. 225. IRBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *A. Andrew Giangreco* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 304 F. 2d 280.

No. 301. WEIGEL *v.* PARTENWEEDEREI ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Clifford D. O'Brien* for petitioner. *Erskine B. Wood* and *Alfred A. Hampson* for respondents. Reported below: 299 F. 2d 897.

No. 260. NORTH CAROLINA NATURAL GAS CORP. *v.* MCJUNKIN CORPORATION. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted in this case because the petitioning North Carolina Natural Gas Corporation has been denied its right to a trial by jury guaranteed by the Seventh Amendment to the Constitution. *Eugene Gressman* for petitioner. *John H. Anderson, Willis Smith, Jr., Arthur G. Stone* and *Donald O. Blagg* for respondent. Reported below: 300 F. 2d 794.

No. 309. ABERNATHY ET AL. *v.* CITY OF IRVINE ET AL. Court of Appeals of Kentucky. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *R. J. Turley* for petitioners. *Thomas D. Shumate* for respondents. Reported below: 355 S. W. 2d 159.

No. 267. MID-AMERICA TELEPHONE CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Motion of petitioner for leave to proceed *in forma pauperis* denied. The alternative motion to dispense with printing the petition for certiorari granted. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mark McElroy,* Attorney General of Ohio, *Herbert T. Maher* and *Andrew R. Sarisky,* Assistant Attorneys General, and *E. N. Strand* for respondents. Reported below: 173 Ohio St. 333, 182 N. E. 2d 319.

No. 9, Misc. SOSTRE *v.* OSWALD, PAROLE BOARD CHAIRMAN, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondents.

No. 19, Misc. FREEMAN *v.* KIDD, U. S. MARSHAL, ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for respondents.

No. 22, Misc. JOHNSON *v.* BENNETT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Evan Hultman,* Attorney General of Iowa, for respondents.

No. 25, Misc. HOWIE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 26, Misc. GALLUP *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Charles R. Lind* and *Linward Shivers,* Assistant Attorneys General, for respondent.

No. 28, Misc. GREEN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se.* *Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

No. 33, Misc. KASSIM *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Irving Galt,* Assistant Solicitor General, for respondents. Reported below: 298 F. 2d 479.

No. 36, Misc. KERSHNER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Andrew J. Goodwin,* Assistant Attorneys General, for respondent.

No. 39, Misc. HALCOMB *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondents.

No. 40, Misc. WOLOCHEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *William I. Siegel* for respondent.

No. 23, Misc. JOHNSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——.

No. 57, Misc. MUNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 58, Misc. ELLIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 64, Misc. POST *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *Claude A. Joyce* and *George H. Mitchell,* Assistant Attorneys General, for respondent. Reported below: 147 W. Va. ——, 124 S. E. 2d 697.

No. 72, Misc. HAWKINS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 112 U. S. App. D. C. 257, 302 F. 2d 191.

No. 43, Misc. POWELL *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *George H. Mitchell* and *Andrew J. Goodwin*, Assistant Attorneys General, for respondent.

No. 45, Misc. WILLIAMS *v.* BLACKWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 46, Misc. FRANKFURTER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Robert R. Granucci* and *John S. McInerny*, Deputy Attorneys General, for respondent.

No. 50, Misc. SOSTRE *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 71, Misc. MILLER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for the United States et al.

No. 73, Misc. HOLIDAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 300 F. 2d 441.

No. 76, Misc. CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 77, Misc. STEVENSON *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 155 Ct. Cl. —.

No. 79, Misc. HUCKS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles E. Robbins* and *Benedict F. FitzGerald, Jr.* for petitioner. *Acting Solicitor General Spritzer, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 112 U. S. App. D. C. 224, 301 F. 2d 548.

No. 81, Misc. MARSHALL *v.* INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 83, Misc. SMITH *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied.

No. 84, Misc. MULLIGAN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 85, Misc. LAMBERT *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 86, Misc. EVANS *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Reported below: 88 Ariz. 364, 356 P. 2d 1106.

No. 92, Misc. GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 90, Misc. BELL *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 93, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 94, Misc. HOLLAND *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 95, Misc. ANDERSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 96, Misc. HAWRYLIAK *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 97, Misc. ELLINGER *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 114, Misc. MACDONALD *v.* DUNNE, JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 115, Misc. GRAVES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 112 U. S. App. D. C. 161, 300 F. 2d 916.

No. 100, Misc. JESSIE *v.* REINCKE, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 106, Misc. WATSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 228 Md. 653, 179 A. 2d 348.

No. 107, Misc. HALPERN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 109, Misc. MILLER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 111, Misc. MARTIN, ALIAS MORGAN, ET AL. *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 112, Misc. PITTORE *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 228 Md. 112, 178 A. 2d 421.

No. 116, Misc. HUNTLEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 117, Misc. ELDARD *v.* LAVALLEE, WARDEN. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: 15 App. Div. 2d 611, 222 N. Y. S. 2d 462.

No. 119, Misc. TURMON *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 118, Misc. JACKSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 226, 181 N. E. 2d 66.

No. 120, Misc. MITCHELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 122, Misc. MOORE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 123, Misc. RICKS *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania. Certiorari denied.

No. 125, Misc. BURNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 301 F. 2d 666.

No. 128, Misc. SHERWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 300 F. 2d 603.

No. 129, Misc. COATES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 130, Misc. DIBLIN *v.* KATZ. C. A. 2d Cir. Certiorari denied.

No. 131, Misc. GREEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 132, Misc. DUNBAR *v.* KEENAN ET AL. Supreme Court of Pennsylvania. Certiorari denied.

No. 133, Misc. SMITH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 136, Misc. PRIORI *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 137, Misc. CARTER *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: — Tex. Cr. R. —.

No. 138, Misc. CREWS *v.* NEW YORK. Supreme Court of New York, Clinton County. Certiorari denied.

No. 140, Misc. WIGGINS *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 149, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 165, Misc. BELTOWSKI *v.* EVERSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 142, Misc. PUDDU *v.* ROYAL NETHERLANDS STEAMSHIP CO. C. A. 2d Cir. Certiorari denied. *Robert Klonsky* and *Philip F. DiCostanzo* for petitioner. *George J. Conway* and *Michael J. Kenny* for respondent. Reported below: 303 F. 2d 752.

No. 143, Misc. WARREN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 146, Misc. DEES *v.* RIVERS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondents.

No. 147, Misc. SENNA *v.* KENNEDY, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL. Court of Appeals of New York. Certiorari denied. *Carl L. Shipley, Thomas A. Ziebarth* and *Samuel Resnicoff* for petitioner. *Leo A. Larkin* and *Seymour B. Quel* for respondents.

No. 148, Misc. PYLES *v.* WARDEN, MARYLAND PENITENTIARY. Baltimore City Court of Maryland. Certiorari denied.

No. 151, Misc. TURNER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 152, Misc. SIMS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *Lewis T. Booker* for petitioner. Reported below: 203 Va. 347, 124 S. E. 2d 221.

No. 159, Misc. PERKINS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 11 N. Y. 2d 195, 182 N. E. 2d 274.

No. 154, Misc. HARRIS *v.* MCGARRAGHY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for respondents.

No. 157, Misc. KIRBY *v.* ILLINOIS. Circuit Court of Fayette County, Illinois. Certiorari denied.

No. 160, Misc. MENDENHALL *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 161, Misc. PULLITE *v.* ILLINOIS. Circuit Court of Vermillion County, Illinois. Certiorari denied.

No. 162, Misc. SMITH *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 163, Misc. HILLYARD, ADMINISTRATOR, *v.* NATIONAL DAIRY PRODUCTS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Ivan Elliott* for respondents. Reported below: 301 F. 2d 277.

No. 164, Misc. WRIGHT *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 166, Misc. RIVERS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 301 F. 2d 782.

No. 168, Misc. FLETT *v.* W. A. ALEXANDER & CO. ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin Wham* for petitioner. *William A. McSwain, Leo F. Tierney, Bryson P. Burnham, John B. Robinson, Jr.* and *W. Donald McSweeney* for respondents. Reported below: 302 F. 2d 321.

No. 167, Misc. ELY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 169, Misc. RUBERTO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 10 N. Y. 2d 428, 179 N. E. 2d 848.

No. 170, Misc. MORRIS *v.* TAYLOR. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. Reported below: 353 S. W. 2d 956.

No. 171, Misc. HANSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 301 F. 2d 180.

No. 173, Misc. FOREMAN *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 177, Misc. LORENTZEN *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 178, Misc. TAYLOR *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 179, Misc. JARRELL *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 181, Misc. HOLLEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 174, Misc. SKANTZE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 182, Misc. SNEED *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: — Tex. Cr. R. —, 356 S. W. 2d 785.

No. 183, Misc. GWYNN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 184, Misc. COLLINS *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 242 La. 704, 138 So. 2d 546.

No. 194, Misc. GRIECO *v.* LANGLOIS, WARDEN. Supreme Court of Rhode Island. Certiorari denied. Reported below: — R. I. —, 181 A. 2d 230.

No. 197, Misc. GOSS *v.* ALASKA. Supreme Court of Alaska. Certiorari denied. Reported below: — Alaska —, 360 P. 2d 884.

No. 205, Misc. TURNER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 112 U. S. App. D. C. 202, 301 F. 2d 526.

No. 187, Misc. JOSEPH *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 302 F. 2d 38.

No. 188, Misc. WOODS *v.* LOWERY. C. A. 5th Cir. Certiorari denied. *Lomax B. Lamb, Jr.* and *William H. Maynard* for petitioner. *John R. Stivers* for respondent. Reported below: 297 F. 2d 827.

No. 189, Misc. MCGEE *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *Robert W. Pickrell,* Attorney General of Arizona, and *Kenneth G. Flickinger, Jr.,* Assistant Attorney General, for respondent. Reported below: 91 Ariz. 101, 370 P. 2d 261.

No. 191, Misc. HARRELSON *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 196, Misc. RUDOLPH *v.* WARDEN, MARYLAND PENITENTIARY. Circuit Court of Baltimore County, Maryland. Certiorari denied.

No. 198, Misc. WILLIAMS *v.* EMPLOYERS LIABILITY ASSURANCE CO. C. A. 5th Cir. Certiorari denied. *John W. Bryan, Jr.* for petitioner. Reported below: 296 F. 2d 569.

No. 199, Misc. GILBERT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 201, 181 N. E. 2d 167.

No. 203, Misc. O'CONNOR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 202, Misc. CUFF *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 204, Misc. CURTIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 191, 181 N. E. 2d 75.

No. 207, Misc. RUCKLE *v.* WARDEN, BALTIMORE CITY JAIL. C. A. 4th Cir. Certiorari denied.

No. 208, Misc. GARNETT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 209, Misc. HIRSCH *v.* ARCHER-DANIELS-MIDLAND CO. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *A. Donald MacKinnon* for respondent. Reported below: 299 F. 2d 792.

No. 210, Misc. NERWINSKI *v.* YEAGER, PRISON KEEPER. C. A. 3d Cir. Certiorari denied.

No. 214, Misc. COHEN *v.* LOUISIANA STATE BAR ASSOCIATION. Supreme Court of Louisiana. Certiorari denied. *G. Wray Gill* for petitioner. *John Pat. Little* for respondent. Reported below: 242 La. 838, 138 So. 2d 594.

No. 215, Misc. YBARRA *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied.

No. 218, Misc. HOLLAND *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 221, Misc. WHITSEL *v.* BETO, CORRECTIONS MANAGER. Court of Criminal Appeals of Texas. Certiorari denied.

No. 223, Misc. BROWN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 226, Misc. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 227, Misc. MILES ET AL. *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied.

No. 228, Misc. BEAN *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Reported below: 139 So. 2d 393.

No. 235, Misc. WADE *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 357 S. W. 2d 678.

No. 236, Misc. AARON *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *Fred D. Gray* for petitioner. *MacDonald Gallion*, Attorney General of Alabama, *George D. Mentz*, Assistant Attorney General, and *William F. Thetford* for respondent. Reported below: 273 Ala. 337, 139 So. 2d 309.

No. 245, Misc. ROBERTS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: — Tex. Cr. R. —.

No. 248, Misc. BOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 224, Misc. MINIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Schwartz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 303 F. 2d 550.

No. 230, Misc. BOHN *v.* ALASKA. Supreme Court of Alaska. Certiorari denied.

No. 231, Misc. HESTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 303 F. 2d 47.

No. 233, Misc. BROWN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 238, Misc. READ *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent.

No. 240, Misc. SIRES *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 241, Misc. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 304 F. 2d 706.

No. 242, Misc. RINALDI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 243, Misc. FALLON *v.* FAY, WARDEN. Supreme Court of New York, Dutchess County. Certiorari denied.

No. 257, Misc. DEBOOR *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 243 Ind. 87, 182 N. E. 2d 250.

No. 266, Misc. CARMACK *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 273 Ala. 705, 141 So. 2d 209.

No. 275, Misc. BAILLEAUX *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 230 Ore. 606, 370 P. 2d 722.

No. 284, Misc. CLARK *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 285, Misc. DEHLER *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *T. Eugene Thompson* for petitioner. Reported below: 262 Minn. 171, 115 N. W. 2d 358.

No. 290, Misc. TAYLOR *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *John Cutler* for petitioner. Reported below: — Tex. Cr. R. —, 358 S. W. 2d 124.

No. 291, Misc. CHEESEBORO *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 255, Misc. MORRIS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 258, Misc. AARONS *v.* WASHINGTON SHERATON CORP. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 259, Misc. BLACK *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 260, Misc. WARD *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 261, Misc. TYLER *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 263, Misc. TEAMOH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 265, Misc. DOYON *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied. Petitioner *pro se*. *Frank E. Hancock*, Attorney General of Maine, and *Richard A. Foley*, Assistant Attorney General, for respondent. Reported below: 158 Me. 190, 181 A. 2d 586.

No. 267, Misc. MEYES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 270, Misc. CASE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 278, Misc. NORMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 403, 182 N. E. 2d 188.

No. 271, Misc. BURKS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 273, Misc. PETERSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 280, Misc. HANDY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 283, Misc. DAVIS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 288, Misc. MCNERLIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 11 N. Y. 2d 738, 181 N. E. 2d 456; 11 N. Y. 2d 796, 181 N. E. 2d 776.

No. 289, Misc. BLAKEY ET AL. *v.* DOYLE ET AL. C. A. 8th Cir. Certiorari denied. *Walter S. Pawl* for petitioners. Reported below: 301 F. 2d 307.

No. 292, Misc. RUSHING *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 294, Misc. MULLER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Leon Polsky* for petitioner. Reported below: 11 N. Y. 2d 154, 182 N. E. 2d 99.

No. 295. Misc. TORRES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 298, Misc. WALKER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 37 N. J. 208, 181 A. 2d 1.

No. 299, Misc. JANEK *v.* FEDERAL PACIFIC ELECTRIC Co. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Isidor Kalisch* for respondent.

No. 302, Misc. BEAMON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 562, 182 N. E. 2d 656.

No. 310, Misc. ARTHUR *v.* DIRECTOR, PATUXENT INSTITUTION, ET AL. Court of Appeals of Maryland. Certiorari denied.

No. 311, Misc. BOGISH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 313, Misc. SIMS *v.* WILLINGHAM, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 300 F. 2d 162.

No. 314, Misc. STREIT *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 315, Misc. EASTMAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 319, Misc. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 302 F. 2d 659.

No. 361, Misc. MELTON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Louis F. McCabe* for respondent. Reported below: 406 Pa. 343, 178 A. 2d 728.

No. 300, Misc. D'AGOSTINO *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 344 Mass. 276, 182 N. E. 2d 133.

No. 346, Misc. JORDAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent. Reported below: 11 N. Y. 2d 1025, 183 N. E. 2d 908.

No. 400, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 410, Misc. WILSON *v.* MURPHY, WARDEN, ET AL. Court of Appeals of New York. Certiorari denied.

No. 153, Misc. CISNEROS *v.* CALIFORNIA; and

No. 363, Misc. DITSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se* in No. 153, Misc. *Hugh R. Manes* for petitioner in No. 363, Misc. *Stanley Mosk*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Gordon Ringer*, Deputy Attorney General, for respondent in both cases. Reported below: 57 Cal. 2d 415, 369 P. 2d 714.

No. 176, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 113 U. S. App. D. C. 14, 304 F. 2d 381.

No. 414, Misc. SOLOMON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 586, 182 N. E. 2d 736.

No. 30, Misc. SCHABER *v.* OHIO. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Harry Friberg* for respondent. Reported below: 172 Ohio St. 553, 179 N. E. 2d 50.

No. 339, Misc. JARDINE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 11 N. Y. 2d 941, 183 N. E. 2d 228.

No. 158, Misc. PERRY *v.* OHIO. Petition for writ of certiorari to the Supreme Court of Ohio and for other relief denied. Petitioner *pro se*. *John T. Corrigan* for respondent.

No. 293, Misc. BIGGS *v.* ACME FURNACE FITTING CO. ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit and for other relief denied. Reported below: 302 F. 2d 318.

No. 306, Misc. CANTRELL *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California and for other relief denied.

Rehearing Denied.

No. 480, October Term, 1961. MORALES ET AL. *v.* CITY OF GALVESTON ET AL., 370 U. S. 165. Motion for leave to file petition for rehearing denied.

No. 124, October Term, 1961. CREEK NATION *v.* UNITED STATES, 370 U. S. 157;

No. 842, October Term, 1961. KELLY *v.* UNITED STATES, 369 U. S. 886;

No. 885, October Term, 1961. WILLIAMS *v.* HOT SHOPPES, INC., 370 U. S. 925;

No. 907, October Term, 1961. N. V. HANDELSBUREAU LA MOLA *v.* KENNEDY, ATTORNEY GENERAL, 370 U. S. 940;

No. 910, October Term, 1961. WILBURN BOAT CO. ET AL. *v.* FIREMAN'S FUND INSURANCE CO., 370 U. S. 925;

No. 956, October Term, 1961. GRIECO *v.* UNITED STATES, 370 U. S. 925;

No. 974, October Term, 1961. ART NATIONAL MANUFACTURERS DISTRIBUTING CO. ET AL. *v.* FEDERAL TRADE COMMISSION, 370 U. S. 939;

No. 977, October Term, 1961. FUNKHOUSER *v.* UNITED STATES, 370 U. S. 939; and

No. 1028, October Term, 1961. ATKINSON ET AL. *v.* CITY OF DALLAS, 370 U. S. 939. Petitions for rehearing denied.

No. 190, October Term, 1961. UNITED STATES *v.* DAVIS ET AL., 370 U. S. 65;

No. 268, October Term, 1961. DAVIS ET AL. *v.* UNITED STATES, 370 U. S. 65; and

No. 396, October Term, 1961. RUDOLPH ET UX. *v.* UNITED STATES, 370 U. S. 269. Petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these applications.

No. 242, October Term, 1961. GLIDDEN COMPANY *v.* ZDANOK ET AL., 370 U. S. 530. Motion of American Spice Trade Association et al. for leave to file brief, as *amici curiae*, granted. Motion for leave to file petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these motions.

No. 866, October Term, 1961. IN RE CLAWANS, 370 U. S. 905. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 39, Misc., October Term, 1961. BAILEY *v.* SACKS, WARDEN, ET AL., 370 U. S. 925;

No. 900, Misc., October Term, 1961. LOUISIANA EX REL. WASHINGTON *v.* WALKER, WARDEN, 370 U. S. 726;

No. 964, Misc., October Term, 1961. THOMPSON *v.* WASHINGTON, 370 U. S. 945;

No. 1133, Misc., October Term, 1961. OWINGS *v.* JAMIESON, SHERIFF, ET AL., 370 U. S. 928;

No. 1153, Misc., October Term, 1961. OLEN *v.* OLEN, 370 U. S. 721;

No. 1155, Misc., October Term, 1961. BOLDT *v.* UNITED STATES, 370 U. S. 948;

No. 1207, Misc., October Term, 1961. BISNO *v.* UNITED STATES, 370 U. S. 952;

No. 1209, Misc., October Term, 1961. YOUNG *v.* UNITED STATES, 370 U. S. 953;

No. 1212, Misc., October Term, 1961. CRUZ *v.* TEXAS, 370 U. S. 953;

No. 1216, Misc., October Term, 1961. O'LEARY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL., 370 U. S. 953;

No. 1259, Misc., October Term, 1961. SCOTT *v.* UNITED STATES, 370 U. S. 956;

No. 1295, Misc., October Term, 1961. GERALD *v.* UNITED STATES, 370 U. S. 958;

No. 1336, Misc., October Term, 1961. CEPERO *v.* PUERTO RICO ET AL., 370 U. S. 289; and

No. 1343, Misc., October Term, 1961. HARTFORD *v.* WICK, HOSPITAL DIRECTOR, 370 U. S. 932. Petitions for rehearing denied.

No. 400, October Term, 1961. CENTRAL RAILROAD COMPANY OF PENNSYLVANIA *v.* PENNSYLVANIA, 370 U. S. 607. Motion to recall the mandate, presented to MR. JUSTICE HARLAN and by him referred to the Court, denied. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion and application.

No. 919, October Term, 1961. GONDECK *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL., 370 U. S. 918. Motion for leave to file a supplement to the petition for rehearing granted. Petition for rehearing denied.

No. 1178, Misc., October Term, 1961. GARCIA *v.* TURNER, 370 U. S. 950. Motion for leave to file petition for rehearing denied.

Dismissal Under Rule 60.

No. 370. ACCARDO *v.* HOFFMAN, U. S. DISTRICT JUDGE. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Stanford Clinton* and *Maurice J. Walsh* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Theodore George Gilinsky* for respondent.

OCTOBER 13, 1962.

Dismissal Under Rule 60.

No. 102. KOPPERS COMPANY, INC., ET AL. *v.* UNITED STATES. Appeal from the United States District Court for the Western District of Pennsylvania. Dismissed pursuant to Rule 60 of the Rules of this Court. *John M. Crimmins, Templeton Smith* and *Robert L. Kirkpatrick* for appellants. *Solicitor General Cox, Assistant Attorney*

General Loevinger, Robert B. Hummel and *William H. McManus* for the United States. Reported below: 202 F. Supp. 437.

OCTOBER 15, 1962.

Miscellaneous Orders.

No. 11. AVENT ET AL. *v.* NORTH CAROLINA. Certiorari, 370 U. S. 934, to the Supreme Court of North Carolina. The motion to remove this case from the summary calendar is denied. *Jack Greenberg* on the motion for petitioners.

No. 155. GIDEON *v.* COCHRAN, CORRECTIONS DIRECTOR. Certiorari, 370 U. S. 908, to the Supreme Court of Florida. The motion of the respondent to strike portions of designation of record is denied. *Richard W. Ervin,* Attorney General of Florida, and *Bruce R. Jacob,* Assistant Attorney General, on the motion. *Abe Fortas,* by appointment of the Court, 370 U. S. 932, and *Abe Krash* for petitioner, in opposition.

No. 598, Misc. IN RE DISBARMENT OF GATELY. IT IS ORDERED that John H. Gately, of Colorado Springs, Colorado, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

No. 464, Misc. POWELL *v.* LANGLOIS, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *William G. Grande* for petitioner.

No. 506, Misc. CARMELO *v.* MAXWELL, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 488, Misc. PEREZ *v.* HERITAGE, WARDEN;
No. 509, Misc. FORESTIER *v.* HERITAGE, WARDEN;
No. 510, Misc. VALPAIS *v.* HERITAGE, WARDEN;
No. 511, Misc. PACHECO *v.* HERITAGE, WARDEN;
No. 512, Misc. PEREZ *v.* HERITAGE, WARDEN;
No. 513, Misc. GONZALEZ *v.* HERITAGE, WARDEN;
No. 514, Misc. MUZA *v.* CALIFORNIA ET AL.;
No. 525, Misc. DEMARIOS *v.* COCHRAN, CORRECTIONS DIRECTOR;
No. 530, Misc. SANTOS *v.* HERITAGE, WARDEN;
No. 537, Misc. ARRIETA *v.* HERITAGE, WARDEN;
No. 538, Misc. GALARZA *v.* HERITAGE, WARDEN;
No. 539, Misc. CARRION *v.* HERITAGE, WARDEN; and
No. 540, Misc. MARTINEZ *v.* DICKSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 335, Misc. WILSON *v.* CHAMBERS, CHIEF JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (*See also No. 13, Misc., ante, p. 27; No. 24, Misc., ante, p. 27; and No. 49, Misc., ante, p. 25.*)

No. 251. SCHNEIDER *v.* RUSK, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Milton V. Freeman, Robert E. Herzstein, Horst Kurnik* and *Charles A. Reich* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for respondent.

No. 134. NAMET *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *John H. FitzGerald* for petitioner. *Solicitor General Cox* for the United States. Reported below: 301 F. 2d 314.

No. 236. LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *Edward J. Davis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 305 F. 2d 825.

No. 248. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* FLEUTI. C. A. 9th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Philip R. Monahan* and *Maurice A. Roberts* for petitioner. *Hiram W. Kwan* for respondent. Reported below: 302 F. 2d 652.

No. 297. DIXILYN DRILLING CORP. *v.* CRESCENT TOWING & SALVAGE CO. C. A. 5th Cir. Certiorari granted. *E. D. Vickery* for petitioner. *Charles Kohlmeyer, Jr.* for respondent. Reported below: 303 F. 2d 237.

No. 430. ARROW TRANSPORTATION CO. ET AL. *v.* SOUTHERN RAILWAY CO. ET AL. The motion for leave to supplement the petition for certiorari and record is granted. The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is also granted. The Solicitor General is invited to file a brief expressing the views of the United States. *Donald Macleay* and *John C. Lovett* for petitioners. *Dean Acheson* and *Francis M. Shea* for Southern Railway Co., respondent. Reported below: 308 F. 2d 181.

No. 75, Misc. BUSH *v.* TEXAS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Criminal Appeals of Texas granted. Case transferred to the appellate docket. *Charles Alan Wright* for petitioner. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind,* Assistant Attorneys General, for respondent. Reported below: 172 Tex. Cr. R. 54, 353 S. W. 2d 855.

Nos. 39 and 293. GASTELUM-QUINONES *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent.

No. 336, Misc. BASHAM *v.* PENNSYLVANIA RAILROAD CO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Appeals of New York granted. Case transferred to the appellate docket. *Ira Gammerman* for petitioner. *David J. Mountan, Jr.* for respondent. Reported below: 11 N. Y. 2d 991, 183 N. E. 2d 704.

No. 413, Misc. NORVELL *v.* ILLINOIS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Illinois granted. Case transferred to the appellate docket. *Thomas P. Sullivan* for petitioner. Reported below: 25 Ill. 2d 169, 182 N. E. 2d 719.

Certiorari Denied. (*See also No. 291, ante, p. 22; No. 408, Misc., ante, p. 25; No. 446, Misc., ante, p. 24; and No. 506, Misc., supra.*)

No. 206. BOWATER STEAMSHIP CO., LTD., *v.* PATTERSON ET AL. C. A. 2d Cir. Certiorari denied. *Lee C. Hinslea* for petitioner. *Thomas P. McMahon* for respondents. Reported below: 303 F. 2d 369.

No. 253. J. G. BOSWELL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Melvin D. Wilson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Loring W. Post* and *Charles B. E. Freeman* for respondent. Reported below: 302 F. 2d 682.

No. 227. WASSERMANN *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. *Jacob Rassner* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Robert W. Bush,* Assistant Attorney General, for respondent. Reported below: 13 App. Div. 2d 591, 212 N. Y. S. 2d 884.

No. 239. FARMERS UNION CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Ralph A. Yeo* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for respondent. Reported below: 300 F. 2d 197.

Nos. 249 and 250. SUN OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *John A. Ward III, Robert E. May, Omar L. Crook* and *Martin A. Row* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, John G. Laughlin, Jr., Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for respondent. Reported below: 304 F. 2d 293; 304 F. 2d 290.

No. 255. FEDERAL TRADE COMMISSION *v.* TIMKEN ROLLER BEARING CO. C. A. 6th Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Loevinger, J. William Doolittle, Robert B. Hummel, Irwin A. Seibel, James McI. Henderson* and *Alvin L. Berman* for petitioner. *John G. Ketterer* for respondent. Reported below: 299 F. 2d 839.

No. 270. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George H. Koster* for petitioner. *Solicitor General Cox* for the United States. Reported below: 303 F. 2d 304.

No. 256. IN RE ESTATE OF HURST. Supreme Court of Pennsylvania. Certiorari denied. *Robert M. Taylor* for petitioner Alker. *J. Pennington Straus* for residuary legatees, and *Ralph S. Snyder,* Deputy Attorney General of Pennsylvania, for the Commonwealth of Pennsylvania, in opposition. Reported below: 406 Pa. 612, 179 A. 2d 436.

No. 276. NORTHERN CALIFORNIA PHARMACEUTICAL ASSOCIATION ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur B. Hanson* and *Emmett E. Tucker, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum* for the United States. Reported below: 306 F. 2d 379.

No. 292. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* OVERNITE TRANSPORTATION CO. Supreme Court of North Carolina. Certiorari denied. *David Previant, Herbert S. Thatcher, Edwin Pearce* and *Edward Bennett Williams* for petitioner. *Whiteford S. Blakeney* for respondent. Reported below: 257 N. C. 18, 125 S. E. 2d 277.

No. 296. REILING *v.* HAMMERSTEN. Supreme Court of Minnesota. Certiorari denied. *T. Eugene Thompson* for petitioner. Reported below: 262 Minn. 200, 115 N. W. 2d 259.

No. 298. LAND, EXECUTOR, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John E. Adams* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Arthur I. Gould* for the United States. Reported below: 303 F. 2d 170.

No. 170. FINKELSTEIN ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Emanuel Redfield* for petitioners. *Frank S. Hogan, H. Richard Uviller* and *Peter J. O'Connor* for respondent. Reported below: 11 N. Y. 2d 300, 183 N. E. 2d 661.

No. 175. ZUCKER *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Emanuel Redfield* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 15 App. Div. 2d 883, 225 N. Y. S. 2d 154.

No. 285. JOE QUONG ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Melvin B. Lewis* for petitioners. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Doris H. Spangenburg* for the United States. Reported below: 303 F. 2d 499.

No. 54, Misc. ALVAREZ, ALIAS WALKER, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 55, Misc. MALONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 299 F. 2d 254.

No. 110, Misc. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 299 F. 2d 661.

No. 155, Misc. DUNCAN *v.* HOLDER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 190, Misc. NATIONS *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind,* Assistant Attorneys General, for respondent.

No. 200, Misc. SANCHEZ *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 253, Misc. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 302 F. 2d 427.

No. 254, Misc. ORRIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 302 F. 2d 695.

No. 272, Misc. ZUPKO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 269, Misc. SHIFFLETT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

No. 276, Misc. FOSTER *v.* PITCHES, SHERIFF, ET AL. Supreme Court of California. Certiorari denied.

No. 282, Misc. MCABEE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 304, Misc. FRANANO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 303 F. 2d 470.

No. 307, Misc. TAYLOR *v.* EVANS, CHIEF OF POLICE. Supreme Court of California. Certiorari denied.

No. 308, Misc. HUTCHINS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 309, Misc. SMITH *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Reported below: 91 Ariz. 49, 369 P. 2d 901.

No. 317, Misc. BARNHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 305 F. 2d 164.

No. 321, Misc. DIXON *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Reported below: 142 So. 2d 5.

No. 324, Misc. BUTLER *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 407 Pa. 535, 180 A. 2d 923.

No. 325, Misc. BALES *v.* WESTERN BARIUM CORP. ET AL. Supreme Court of California. Certiorari denied.

No. 331, Misc. REICKAUER *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 299 F. 2d 170.

No. 333, Misc. STANISLOWSKI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 334, Misc. BARMORE *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 338, Misc. SPINNEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 340, Misc. SCHULTZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 341, Misc. HILL *v.* OKLAHOMA ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 373 P. 2d 83.

No. 344, Misc. MCGANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 329, Misc. VILLARREAL *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *John J. Pichinson* for petitioner. Reported below: —— Tex. Cr. R. ——, 355 S. W. 2d 516.

No. 342, Misc. DUNCAN *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied. Reported below: 158 Me. 265, 183 A. 2d 209.

No. 350, Misc. REECE *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Supreme Court of Washington. Certiorari denied.

No. 362, Misc. MCINTYRE *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *John Saleh* for petitioner. Reported below: —— Tex. Cr. R. ——, 360 S. W. 2d 875.

No. 364, Misc. JENKOT *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 381, Misc. JERONIS *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 384, Misc. MIDGETT *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 617, 182 A. 2d 52.

No. 411, Misc. POLLARD *v.* BANNAN, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 369, Misc. BALLARD *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 345, Misc. MARRO ET AL. *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 349, Misc. RAY *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 354 S. W. 2d 840.

No. 353, Misc. NASH *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. Reported below: 149 Conn. 655, 183 A. 2d 275.

No. 357, Misc. RINE *v.* BOLES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 305 F. 2d 375.

No. 372, Misc. HAMPTON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 24 Ill. 2d 558, 182 N. E. 2d 698.

No. 378, Misc. DUFRENE *v.* INDEMNITY INSURANCE CO. OF NORTH AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 303 F. 2d 788.

No. 379, Misc. JEFFERSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 228 Md. 331, 179 A. 2d 876.

No. 380, Misc. GOODMAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 385, Misc. HICKS *v.* FLEMMING, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for respondent. Reported below: 302 F. 2d 470.

No. 382, Misc. HORNBECK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 386, Misc. SHORT *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 387, Misc. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Everett A. Corten* for the Industrial Accident Commission of California, respondent.

No. 388, Misc. FOSTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 393, Misc. WALKER *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 16 App. Div. 2d 706, 227 N. Y. S. 2d 749.

No. 395, Misc. KING *v.* MAXWELL, WARDEN, ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 173 Ohio St. 536, 184 N. E. 2d 380.

No. 398, Misc. MILES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 401, Misc. SMITH *v.* KERN TRUCK SALES, INC., ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Mark McElroy*, Attorney General of Ohio, *Theodore R. Saker* and *Albert A. Yannon*, Assistant Attorneys General, for the Administrator of the Bureau of Workmen's Compensation, respondent.

No. 404, Misc. NELSON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 405, Misc. WEAVER *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 173 Ohio St. 415, 183 N. E. 2d 373.

No. 406, Misc. BRYAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 409, Misc. KING *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 417, Misc. SMITH *v.* HAND, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 305 F. 2d 373.

No. 418, Misc. WARD *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 419, Misc. LLOYD *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 420, Misc. PAYNE *v.* THE NABOB ET AL. C. A. 3d Cir. Certiorari denied. *Philip Dorfman* for petitioner. *Thomas F. Mount* for The Nabob and North German Lloyd, respondents. Reported below: 302 F. 2d 803.

No. 428, Misc. WYNN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 434, Misc. KIEFABER *v.* PENNSYLVANIA. Superior Court of Pennsylvania. Certiorari denied. Reported below: 197 Pa. Super. 298, 179 A. 2d 262.

No. 436, Misc. MARSHALL *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

Nos. 439, Misc., 440, Misc., and 441, Misc. SCOTT *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Supreme Court of California. Certiorari denied.

No. 442, Misc. KING *v.* CORRECTIONS COMMISSION ET AL. Supreme Court of Michigan. Certiorari denied.

No. 443, Misc. CONKLIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 448, Misc. DARLING *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 453, Misc. MOORE, ALIAS PHILLIPS, *v.* WIMAN, WARDEN, ET AL. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondents.

No. 454, Misc. SCHNEIDER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Manuel W. Levine* for respondent.

No. 455, Misc. TAYLOR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 457, Misc. WESLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 461, Misc. CLOUTHIER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 462, Misc. HUTCHERSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 465, Misc. CALLAHAN *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner.

No. 466, Misc. MYLES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 483, Misc. HAGEWOOD *v.* BANNAN, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 491, Misc. WALLACE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 492, Misc. BELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Harold Roland Shapiro* for respondent.

No. 34, Misc. WARD *v.* TURNER, WARDEN. Supreme Court of Utah. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Fred H. Evans* for petitioner. *A. Pratt Kesler,* Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General, for respondent. Reported below: 12 Utah 2d 310, 366 P. 2d 72.

No. 87, Misc. FEGUER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this petition. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 302 F. 2d 214.

No. 407, Misc. PENRICE *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California and for other relief denied.

No. 432, Misc. BRINSON *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California and for other relief denied.

Rehearing Denied.

No. 422, October Term, 1961. LINK *v.* WABASH RAILROAD CO., 370 U. S. 626. Petitions for rehearing and reargument denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application.

No. 1020, Misc., October Term, 1961. PUGH *v.* VIRGINIA, 370 U. S. 927. Petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application.

OCTOBER 18, 1962.

Certiorari Denied.

No. 348, Misc. BIZUP *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Reported below: 150 Colo. —, 371 P. 2d 786.

OCTOBER 22, 1962.

Miscellaneous Orders.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. The motion for leave to file bill of complaint is granted and the State of New Jersey is allowed sixty days to answer. *Will Wilson*, Attorney General of Texas, and *Henry G.*

Braswell, Assistant Attorney General, for plaintiff. *Arthur J. Sills,* Attorney General of New Jersey, *Theodore I. Botter,* Assistant Attorney General, and *Charles J. Kehoe,* Deputy Attorney General, for the State of New Jersey; *David Stahl,* Attorney General of Pennsylvania, and *Jack M. Cohen,* Deputy Attorney General, for the Commonwealth of Pennsylvania; and *Henry A. Frye* for Sun Oil Co., defendants. [For earlier orders herein, see 369 U. S. 869 and 370 U. S. 929.]

No. 53, Misc. IN RE DISBARMENT OF CHOPAK.

It having been reported to the Court that Jules Chopak, of Brooklyn, State of New York, has been disbarred from the practice of law in all the courts of the State of New York by judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, duly entered on the 30th day of June, A. D., 1960, and this Court by order of April 6, 1962, having suspended the said Jules Chopak from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, who has filed a return thereto; now, upon consideration of the rule to show cause and the return aforesaid;

IT IS ORDERED that the said Jules Chopak be, and he is hereby disbarred, and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 150, Misc. BURKE *v.* ANDERSON, JAIL SUPERINTENDENT, ET AL.; and

No. 527, Misc. MENARD *v.* NASH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 324, ante, p. 37, and No. 18, Misc., ante, p. 28.*)

No. 305. WHIPPLE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari granted. *A. C. Lesher, Jr.* for petitioners. *Solicitor General Cox* for respondent. Reported below: 301 F. 2d 108.

No. 316. BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS ET AL. *v.* ALLEN ET AL. Supreme Court of North Carolina. Certiorari granted. *Milton Kramer* and *Lester P. Schoene* for petitioners. *Whiteford S. Blakeney* for respondents. Reported below: 256 N. C. 700, 124 S. E. 2d 871.

No. 322. SPERRY *v.* FLORIDA EX REL. FLORIDA BAR. Supreme Court of Florida. Certiorari granted. *Oscar A. Mellin, LeRoy Hanscom* and *Jack E. Hursh* for petitioner. *John Houston Gunn, J. Lewis Hall* and *Donald J. Bradshaw* for respondent. Briefs of *amici curiae,* in support of the petition, were filed by *John R. Turney, D. W. Markham* and *Nuel D. Belnap* for the Association of Interstate Commerce Commission Practitioners; *Robert M. McManigal* for the American Association of Registered Patent Attorneys and Agents et al.; and *Edward C. Gritzbaugh* for the Florida Patent Law Association. Reported below: 140 So. 2d 587.

Certiorari Denied. (*See also No. 304, ante, p. 36.*)

No. 315. NEW ENGLAND TANK INDUSTRIES, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Vernon C. Stoneman* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 302 F. 2d 273.

No. 302. PORRATA Y VEVE *v.* FAJARDO SUGAR CO. ET AL. Supreme Court of Puerto Rico. Certiorari denied. *Santos P. Amadeo* for petitioner. Reported below: —— P. R. ——.

No. 306. WALSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 305 F. 2d 821.

No. 310. CARNAL *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Charles J. Lincoln* for petitioner. Reported below: 234 Ark. 1050, 356 S. W. 2d 651.

No. 313. RIPPLE SOLE CORP. *v.* AMERICAN BILTRITE RUBBER CO., INC. C. A. 1st Cir. Certiorari denied. *Edwin J. Balluff, Warren C. Horton* and *Irving U. Townsend, Jr.* for petitioner. *Melvin R. Jenney* for respondent. Reported below: 302 F. 2d 2.

No. 320. E. J. LAVINO & CO. *v.* UNITED STATES LINES CO. C. A. 3d Cir. Certiorari denied. *Michael A. Foley* for petitioner. *Mark D. Alspach* and *Robert Cox* for respondent. Reported below: 303 F. 2d 295.

No. 221. MILANOVICH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Calvin H. Childress* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 303 F. 2d 626.

No. 321. KALTREIDER CONSTRUCTION, INC., *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert H. Griffith* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. Reported below: 303 F. 2d 366.

No. 325. JOHN *v.* TRIBUNE COMPANY. Supreme Court of Illinois. Certiorari denied. *Sidney Z. Karasik* for petitioner. *Howard Ellis, Don H. Reuben* and *John E. Angle* for respondent. Reported below: 24 Ill. 2d 437, 181 N. E. 2d 105.

No. 326. MENDELSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Sydney M. Eisenberg* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 305 F. 2d 519.

No. 328. FOX TURKEY FARMS, INC., *v.* FARMERS MUTUAL HAIL INSURANCE CO. OF IOWA. C. A. 8th Cir. Certiorari denied. *Daniel M. Healy* and *Ross H. Oviatt* for petitioner. Reported below: 301 F. 2d 697.

No. 308. DINAN ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard J. Burke* for petitioners. *Warren J. Schneider* for respondent. Reported below: 11 N. Y. 2d 350, 183 N. E. 2d 689.

No. 82, Misc. THOMPSON *v.* CLEMMER, CORRECTIONS DIRECTOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 314. HOFFA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Jacob Kossman, Charles E. Davis* and *O. B. Cline, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Marie L. McCann* for the United States.

No. 317. HARDWARE MUTUAL CASUALTY CO. *v.* McINTYRE;

No. 318. UNITED STATES FIDELITY & GUARANTY CO. *v.* HART; and

No. 319. STANDARD ACCIDENT INSURANCE CO. *v.* AGUIRRE. Motion for leave to file amended brief in opposition to petition for writ of certiorari in No. 317 granted. Petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *John H. Benckenstein* for petitioner, and *Joe H. Tonahill* for respondent in No. 317. *Reo Knowles* for petitioner, and *William Vandercreek* and *Marvin Jones* for respondent in No. 318. *Josh Groce* for petitioner, and *Rudy Rice* and *William Vandercreek* for respondent in No. 319. Reported below: 304 F. 2d 566, 572, 879.

No. 108, Misc. ANDREWS *v.* BLACKWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 121, Misc. BURKE *v.* REID, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 193, Misc. SAWYER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Aloysius B. McCabe* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 112 U. S. App. D. C. 381, 303 F. 2d 392.

No. 216, Misc. TUTTLE *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied. Petitioner *pro se. Frank E. Hancock,* Attorney General of Maine, and *Richard A. Foley,* Assistant Attorney General, for respondent. Reported below: 158 Me. 150, 180 A. 2d 608.

No. 232, Misc. BAGLEY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

No. 416, Misc. DE MELLO *v.* LANGLOIS, WARDEN. Supreme Court of Rhode Island. Certiorari denied. Reported below: — R. I. —, 182 A. 2d 116.

No. 486, Misc. HUGHES *v.* FAY, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: 16 App. Div. 2d 1027.

No. 429, Misc. BAUGUS ET AL. *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Joseph P. Manners* for petitioners. Reported below: 141 So. 2d 264.

No. 327, Misc. CHAVEZ ET AL. *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Richard Gladstein, Norman Leonard* and *Ruth Jacobs* for petitioners. Reported below: 300 F. 2d 683.

No. 352, Misc. BOYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 305 F. 2d 160.

No. 356, Misc. RICHARDSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 365, Misc. GARCIA *v.* HERITAGE, WARDEN. Supreme Court of Puerto Rico. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 370, Misc. SURRATT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 375, Misc. ANDREWS *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. *Rowland Watts* for petitioner. *William M. Ferguson*, Attorney General of Kansas, and *J. Richard Foth* and *Park McGee*, Assistant Attorneys General, for respondent. Reported below: 190 Kan. 109, 372 P. 2d 559.

No. 371, Misc. BOLDEN *v.* PEGELOW ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 421, Misc. READ *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent.

No. 431, Misc. FOSTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Audrey Fox Anderson* for petitioner. Reported below: See 10 N. Y. 2d 99, 176 N. E. 2d 397.

No. 433, Misc. NEWTON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *C. F. Gravel, Jr.* for petitioner.

No. 447, Misc. FOSTER *v.* CALIFORNIA. District Court of Appeal of California. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh, Philip E. Grey* and *Charles W. Sullivan* for respondent.

No. 469, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 470, Misc. BYBEE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 473, Misc. WILLIAMS *v.* ECKLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Ohio. Certiorari denied. Reported below: 173 Ohio St. 410, 183 N. E. 2d 365.

No. 20, Misc. DAVIES *v.* SETTLE, WARDEN. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied, the Court having duly noted the undertaking of the Solicitor General that the Government will not contest the vacation of petitioner's adult commitment if a motion under 28 U. S. C. § 2255 is filed in the sentencing court. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Joseph A. Barry* for respondent. Reported below: 298 F. 2d 844.

OCTOBER 24, 1962.

Dismissal Under Rule 60.

No. 340. FOOTE *v.* SCHWEMLER, TRUSTEE IN BANKRUPTCY. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *Edwin W. Brouse* for petitioner. Reported below: 302 F. 2d 397.

OCTOBER 30, 1962.

Dismissal Under Rule 60.

No. 165. ROMMEL ET AL. *v.* KENNEDY, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *John W. Pehle* and *James H. Mann* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, John G. Laughlin, Jr.* and *Pauline B. Heller* for respondent. Reported below: 112 U. S. App. D. C. 220, 301 F. 2d 544.

OCTOBER 31, 1962.

Dismissals Under Rule 60.

No. 459, Misc. COOPER *v.* ALABAMA. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court. Movant *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 273 Ala. 699, 145 So. 2d 216.

No. 92. LEONARD *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. Dismissed pursuant to Rule 60 of the Rules of this Court. *George Edward Leonard, pro se, Richard T. Brewster* and *Eberhard P. Deutsch* for petitioner. *Solicitor General Cox* for the United States.

NOVEMBER 5, 1962.

Assignment Order.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning November 5, 1962, and ending June 30, 1963, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Miscellaneous Orders.

No. 533, Misc. JACKSON *v.* WARDEN, MARYLAND PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 5. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* GRAY, ATTORNEY GENERAL OF VIRGINIA, ET AL. Certiorari, 365 U. S. 842, to the Supreme Court of Appeals of Virginia. Argued November 8, 1961. Restored to the calendar for reargument, 369 U. S. 833. The motion to substitute Robert Y. Button et al. in the place of Frederick T. Gray et al. as parties respondent is granted. *Robert L. Carter* on the motion.

No. 80. SCHLUDE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. Certiorari, 370 U. S. 902, to the United States Court of Appeals for the Eighth Circuit. The motion of American Institute of Certified Public Accountants for leave to participate in oral argument, as *amicus curiae,* is denied. *Dean Acheson* on the motion.

No. 91. MCLEOD, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, *v.* EMPRESA HONDURENA DE VAPORES, S. A.; and

No. 93. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO, *v.* EMPRESA HONDURENA DE VAPORES, S. A. Certiorari, 370 U. S. 915, to the United States Court of Appeals for the Second Circuit. The motion of the Government of the United Kingdom of Great Britain and Northern Ireland for leave to file brief, as *amicus curiae,* is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Lawrence Hunt* on the motion.

No. 489. DOWNUM *v.* UNITED STATES. Certiorari, *ante,* p. 811, to the United States Court of Appeals for the Fifth Circuit. The motion for the appointment of counsel is granted and it is ordered that *Richard Tinsman, Esquire,* of San Antonio, Texas, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 104. NEW JERSEY ET AL. *v.* NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. Appeal from the United States District Court for the District of New Jersey. (Probable jurisdiction noted, 370 U. S. 933.) The motion of Railway Labor Executives' Association for leave to file brief, as *amicus curiae,* is granted. *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* on the motion. *Vincent P. Biunno* for appellee, in opposition.

No. 491. ANDREWS *v.* UNITED STATES; and

No. 494. DONOVAN *v.* UNITED STATES. Certiorari, *ante,* p. 812, to the United States Court of Appeals for the Second Circuit. The motions for the appointment of counsel are granted and it is ordered that *E. Barrett Prettyman, Jr., Esquire,* of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioners in these cases.

No. 573, Misc. IN RE DISBARMENT OF BRODSTEIN. Ellis Brodstein, Esquire, of Reading, Pennsylvania, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court. The rule to show cause heretofore issued is discharged.

No. 587, Misc. SMITH *v.* RODRIGUEZ. Motion for leave to file petition for writ of habeas corpus denied.

No. 552, Misc. PATTERSON *v.* MAXWELL, WARDEN. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 475, Misc. JACKSON BREWING CO. *v.* CONNALLY, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Cornelius O. Ryan* for petitioner.

Certiorari Granted.

No. 332. BOESCHE, ADMINISTRATOR, *v.* UDALL, SECRETARY OF THE INTERIOR. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to the question presented by the petition which reads as follows:

"Whether the Secretary of the Interior has authority under Section 31 of the Mineral Leasing Act, as amended, to cancel oil and gas leases by administrative action, for failure to comply with the Department's regulations."

Lewis E. Hoffman and *Leon BenEzra* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for respondent. Reported below: 112 U. S. App. D. C. 344, 303 F. 2d 204.

No. 127, Misc. ANDERSON *v.* KENTUCKY. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Appeals of Kentucky granted. Case transferred to the appellate docket. *John Y. Brown* and *Frank E. Haddad, Jr.* for petitioner. *John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent. Reported below: 353 S. W. 2d 381.

Certiorari Denied. (*See also No. 351, ante, p. 67; No. 352, ante, p. 68; and No. 533, Misc., supra.*)

No. 241. TORPATS *v.* MCCONE, DIRECTOR OF CENTRAL INTELLIGENCE AGENCY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Byron N. Scott* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for respondent. Reported below: 112 U. S. App. D. C. 159, 300 F. 2d 914.

No. 275. ESTATE OF FAULKERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Jerome J. O'Dowd* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett, Robert N. Anderson* and *Benjamin M. Parker* for the United States. Reported below: 301 F. 2d 231.

No. 300. SOCONY MOBIL OIL CO., INC., *v.* BROOKLYN UNION GAS CO. ET AL.;

No. 303. MARATHON OIL CO. *v.* BROOKLYN UNION GAS CO. ET AL.;

No. 339. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* BROOKLYN UNION GAS CO. ET AL.; and

No. 344. BROOKLYN UNION GAS CO. ET AL. *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. C. A. 5th Cir. Certiorari denied. *Thomas Fletcher* for Socony Mobil Oil Co., Inc., petitioner in No. 300 and respondent in No. 339. *W. M. Streetman* and *Lewis T. Sweet, Jr.* for respondents in Nos. 300 and 303 and petitioners in No. 344. *Clayton L. Orn* and *Robert M. Vaughan* for petitioner in No. 303. *W. H. Davidson, Jr.* for petitioner in No. 339 and respondent in No. 344. Reported below: 299 F. 2d 692.

No. 329. ARKANSAS LOUISIANA GAS CO. *v.* THOMPSON, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. *Cecil N. Cook* for petitioner. *Bradford D. Corrigan, Jr.* for respondents. Reported below: 303 F. 2d 129.

No. 333. CITY OF DETROIT ET AL. *v.* THEATRE CONTROL CORP. ET AL. Supreme Court of Michigan. Certiorari denied. *Vance G. Ingalls* for petitioners. *William Henry Gallagher* for respondents. *John Sklar* and *Donald J. Prebenda* for intervening respondents. Reported below: 365 Mich. 432, 113 N. W. 2d 783.

No. 341. DILLON ET AL. *v.* HALBOUTY ET AL. Supreme Court of Texas. Certiorari denied. *Levert J. Able* and *James P. Hart* for petitioners. *Harry R. Jones, Cecil N. Cook, James D. Smullen* and *Frank J. Scurlock* for respondents. *Jack Voyles* for the City of Port Arthur, as *amicus curiae,* in support of the petition. Reported below: — Tex. —, 357 S. W. 2d 364.

No. 342. BAEHR ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley, Thomas A. Ziebarth* and *Samuel Resnicoff* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for the United States. Reported below: 157 Ct. Cl. —.

No. 345. COLBY *v.* COLBY. Supreme Court of Nevada. Certiorari denied. *David G. Bress* for petitioner. *John A. Beck* and *Elizabeth R. Young* for respondent. Reported below: 78 Nev. 150, 369 P. 2d 1019.

No. 354. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ET AL. *v.* MAHONEY ET AL., TRADING AS KRUSEN, EVANS & BYRNE. C. A. 3d Cir. Certiorari denied. *James Alan Montgomery, Jr.* for petitioners. *T. E. Byrne, Jr.* for respondents. Reported below: 307 F. 2d 729.

No. 356. TRIPP *v.* TRIPP. Supreme Court of South Carolina. Certiorari denied. *William J. Griffin* and *Robert C. Boyer* for petitioner. *Harvey W. Johnson* for respondent. Reported below: 240 S. C. 334, 126 S. E. 2d 9.

No. 357. BRAMBLETT ET AL. *v.* WILSON. Supreme Court of Arizona. Certiorari denied. *Donald R. Franson* and *John F. Sullivan* for petitioners. Reported below: 91 Ariz. 284, 371 P. 2d 1014.

No. 336. PETERSON ET AL. *v.* THARP. C. A. 5th Cir. Certiorari denied. *Ellis F. Morris* for petitioners. *W. Ervin James* for respondent. Reported below: 299 F. 2d 434.

No. 338. BROOKS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert E. Lillard* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 303 F. 2d 851.

No. 343. AKSHUN MANUFACTURING CO. ET AL. *v.* NORTH STAR ICE EQUIPMENT CO. C. A. 7th Cir. Certiorari denied. *William VanDercreek* and *J. Warren McCaffrey* for petitioners. *John Rex Allen* for respondent. Reported below: 301 F. 2d 882.

No. 346. SANTA MARIA SHIPOWNING & TRADING CO., S. A., ET AL. *v.* PANTELOGLOU ET AL. C. A. 2d Cir. Certiorari denied. *Robert C. Thomson, Jr.* for petitioners. *Edward B. Joachim* for respondents. Reported below: 303 F. 2d 641.

No. 348. LUNDBERG, ADMINISTRATRIX, *v.* ROSE FUEL & MATERIALS, INC. C. A. 7th Cir. Certiorari denied. *Maurice N. Frank* for petitioner. *James J. Stewart* for respondent. Reported below: 302 F. 2d 825.

No. 358. AUDET ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *P. M. Barceloux* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Edmund B. Clark* for the United States.

No. 363. GINSBURG *v.* LING, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. *Paul Ginsburg*, petitioner, *pro se*.

No. 350. BECK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James P. Turner* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 305 F. 2d 595.

No. 359. NAFIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Murry L. Randall* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 304 F. 2d 810.

No. 361. COLPO *v.* HIGHWAY TRUCK DRIVERS & HELPERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 3d Cir. Certiorari denied. *H. B. Rubenstein* and *Harold Leshem* for petitioner. Reported below: 305 F. 2d 362.

No. 366. COREY *v.* UNITED STATES; and

No. 387. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *E. F. Bernard* for petitioner in No. 366. *Kenneth E. Roberts* for petitioner in No. 387. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 305 F. 2d 197.

No. 369. PERRICONE ET UX. *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied. *Hayden C. Covington* for petitioners. Reported below: 37 N. J. 463, 181 A. 2d 751.

No. 372. CADE ET AL. *v.* CITY OF MONROE. Supreme Court of Louisiana. Certiorari denied. *James Sharp, Jr.* for petitioners.

No. 374. TODARO *v.* PEDERSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Henry C. Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for respondent. Reported below: 305 F. 2d 377.

No. 410. JACKSON BREWING CO. *v.* CLARKE. C. A. 5th Cir. Certiorari denied. *Cornelius O. Ryan* for petitioner. *W. C. Harvin* for respondent. Reported below: 303 F. 2d 844.

No. 331. KLAPHOLZ *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Morey J. Herzog* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for respondent. Reported below: 302 F. 2d 928.

No. 349. UNITED MINE WORKERS OF AMERICA *v.* FLAME COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harrison Combs* and *M. E. Boiarsky* for petitioner. *Howard H. Baker, Jr.* for respondents. Reported below: 303 F. 2d 39.

No. 365. GREENHILL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Eugene Gressman* and *George Kaufmann* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 305 F. 2d 289.

No. 371. ATLANTIC COAST LINE RAILROAD CO. *v.* MILSTEAD; and

No. 382. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* MILSTEAD. Supreme Court of Alabama. Certiorari denied. *John W. Weldon* and *Peyton D. Bibb* for petitioner in No. 371. *Harold C. Heiss, Russell B. Day, Erle Pettus, Jr., Lucien D. Gardner, Jr.* and *Harold N. McLaughlin* for petitioners in No. 382. *William M. Acker, Jr.* for respondent. Reported below: 273 Ala. 557, 142 So. 2d 705.

No. 337. PEDERSON *v.* MINNESOTA ET AL. Motion for leave to dispense with printing the petition granted. Petition for writ of certiorari to the Supreme Court of Minnesota denied. Reported below: 262 Minn. 568, 115 N. W. 2d 466.

No. 364. HOFFA ET AL. *v.* LIEB, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Jacob Kossman, Charles E. Davis* and *O. B. Cline, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marie L. McCann* for respondent.

No. 60, Misc. SMOKER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 91, Misc. LABAT *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied. *Benjamin E. Smith* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan, John E. Jackson, Jr.* and *Dorothy D. Wolbrette,* Assistant Attorneys General, for respondent.

No. 355. LYND, CIRCUIT CLERK AND REGISTRAR OF VOTERS OF FORREST COUNTY, MISSISSIPPI, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands, Peter M. Stockett, Jr.* and *Will S. Wells,* Assistant Attorneys General, and *M. M. Roberts* for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for the United States. Reported below: 301 F. 2d 818.

No. 104, Misc. ROLLINS *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *William E. James,* Assistant Attorney General, for respondents.

No. 113, Misc. ROSANIA *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Peter Murray* for respondent. Reported below: 299 F. 2d 101.

No. 124, Misc. BOWIE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *Robert R. Granucci, John S. McInerny* and *John F. Foran,* Deputy Attorneys General, for respondent.

No. 145, Misc. CUOMO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. William I. Siegel* for respondent.

No. 252, Misc. JACKSON *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se. John K. Best* for respondents.

No. 220, Misc. PERPIGLIA *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 277, Misc. BURROW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 301 F. 2d 442.

No. 281, Misc. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *C. J. Gates* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Joseph M. Howard* for the United States. Reported below: 305 F. 2d 183.

No. 303, Misc. MCCALIP *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 316, Misc. SARTAIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 303 F. 2d 859.

No. 318, Misc. SWANSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 304 F. 2d 865.

No. 323, Misc. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 304 F. 2d 91.

No. 354, Misc. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 304 F. 2d 243.

No. 377, Misc. CASHION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for the United States.

No. 392, Misc. JORDAN *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent.

No. 399, Misc. PRESSLEY, ALIAS JONES, *v.* ENGLAND, DIRECTOR OF MOTOR VEHICLES, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondents.

No. 402, Misc. TUTHILL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Winston S. Howard* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 305 F. 2d 595.

No. 426, Misc. PAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for the United States. Reported below: 304 F. 2d 446.

No. 305, Misc. MANN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Gerry Levenberg* and *W. L. Craig* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 113 U. S. App. D. C. 27, 304 F. 2d 394.

No. 330, Misc. THREATT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 113 U. S. App. D. C. 53, 304 F. 2d 630.

No. 471, Misc. CHASE *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 231 Ore. 469, 372 P. 2d 972.

No. 490, Misc. TURPIN *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 499, Misc. WIMBUSH *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 616, 182 A. 2d 357.

No. 500, Misc. CARMACK *v.* WIMAN, WARDEN. Court of Appeals of Alabama. Certiorari denied. Petitioner *pro se. MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 143 So. 2d 620.

No. 460, Misc. SUMMERS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 468, Misc. CORNES *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 472, Misc. HAYES *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 474, Misc. CARR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 477, Misc. GIAGNOCAVO *v.* AMERICAN CAN CO. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Emanuel Klein* for respondent.

No. 478, Misc. LEVINE *v.* RADIO CORPORATION OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 302 F. 2d 729.

No. 479, Misc. HUNTER *v.* JUERGENS, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied.

No. 480, Misc. CARR *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 481, Misc. JACOBS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 484, Misc. WILLIAMS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 489, Misc. REED *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Leon Polsky* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Robert Popper* for respondent. Reported below: 11 N. Y. 2d 1022, 183 N. E. 2d 907.

No. 493, Misc. DUFF *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 126, 182 A. 2d 349.

No. 517, Misc. BARKER *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied.

No. 519, Misc. MCCONNON ET AL. *v.* RAOUL-DUVAL ET AL. Supreme Court of California. Certiorari denied.

No. 521, Misc. O'CONNOR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 524, Misc. DAVIS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 229 Md. 139, 182 A. 2d 49.

No. 526, Misc. SNEAD *v.* WARDEN, MARYLAND PENITENTIARY., Court of Appeals of Maryland. Certiorari denied.

No. 247, Misc. MILLER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Donald Page Moore* for petitioner. *William G. Clark,* Attorney General of Illinois, and *William C. Wines, Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General, for respondent. Reported below: 300 F. 2d 414.

No. 563, Misc. GLUCKSTERN *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

Rehearing Denied.

No. 292. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* OVERNITE TRANSPORTATION CO., *ante*, p. 862. Petition for rehearing denied.

No. 30, Misc. SCHABER *v.* OHIO, *ante*, p. 853; and
No. 73, Misc. HOLIDAY *v.* UNITED STATES, *ante*, p. 834. Petitions for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of these applications.

NOVEMBER 13, 1962.

Miscellaneous Orders.

No. 62. NORTHERN NATURAL GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS. Appeal from the Supreme Court of Kansas. (Probable jurisdiction noted, 370 U. S. 901.) The motion of the State of Texas for leave to participate in oral argument, as *amicus curiae*, is denied. *Will Wilson*, Attorney General of Texas, and *Linward Shivers*, Assistant Attorney General, on the motion.

No. 104. NEW JERSEY ET AL. *v.* NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. Appeal from the United States District Court for the District of New Jersey. (Probable jurisdiction noted, 370 U. S. 933.) The motion of the National Association of Railroad and Utilities Commissioners for leave to file brief, as *amicus curiae*, is granted. *Austin L. Roberts, Jr.* on the motion. *Vincent P. Biunno* for appellee, in opposition.

No. 140. WILLNER *v.* COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT. Certiorari, 370 U. S. 934, to the Court of Appeals of New York. The motion of the respondent to dismiss the writ of certiorari is denied. *Louis J. Lefkowitz,* Attorney General of New York, on the motion. *Henry Waldman* for petitioner, in opposition.

No. 398. TENNESSEE *v.* MYERS ET AL. On petition for writ of certiorari to the Supreme Court of Tennessee. The motion of the Attorney General of Tennessee to dismiss the petition for writ of certiorari is granted. *G. Edward Friar* and *William A. Reynolds* on the petition. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, on the motion to dismiss the petition.

Probable Jurisdiction Noted.

No. 392. HEAD, DOING BUSINESS AS LEA COUNTY PUBLISHING CO., ET AL. *v.* NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY. Appeal from the Supreme Court of New Mexico. Probable jurisdiction noted. In addition to the questions listed in the jurisdictional statement, the parties are requested to address themselves to the issue of possible federal preemption by reason of the Federal Communications Act. The Solicitor General is also invited to express the views of the Federal Communications Commission on this issue. *Carol J. Head* for appellants. Reported below: 70 N. M. 90, 370 P. 2d 811.

Certiorari Granted. (*See also No. 375, ante, p. 72.*)

No. 237, Misc. JACKSON *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Claims granted. Case

transferred to the appellate docket. *Charles D. Ablard* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 156 Ct. Cl. —, 297 F. 2d 939.

Certiorari Denied.

No. 113. CAMPBELL ET AL. *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Stanford Shmukler, Leon H. Kline* and *Martin Vinikoor* for petitioners. *John T. Miller* for respondent. Reported below: See 196 Pa. Super. 380, 175 A. 2d 324.

No. 334. LANZA ET AL. *v.* WAGNER, MAYOR OF NEW YORK CITY, ET AL. Court of Appeals of New York. Certiorari denied. *Vito F. Lanza, pro se,* and *Samuel Shapiro* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, *Irving Galt,* Assistant Solicitor General, *Sheldon Raab,* Deputy Assistant Attorney General, *Leo A. Larkin* and *Seymour B. Quel* for respondents. Reported below: 11 N. Y. 2d 317, 183 N. E. 2d 670.

No. 378. ALLISON *v.* UNITED STATES. Court of Claims. Certiorari denied. *Andrew V. Allison,* petitioner, *pro se. Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for the United States. Reported below: 157 Ct. Cl. —, 301 F. 2d 670.

No. 379. HANSEN ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas F. McKenna, Richard H. Speidel* and *Joseph A. Sommer* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Raymond N. Zagone* for the Secretary of the Interior, respondent. Reported below: 113 U. S. App. D. C. 68, 304 F. 2d 944.

No. 377. VILLAGE OF BROWN DEER *v.* CITY OF MILWAUKEE ET AL. Supreme Court of Wisconsin. Certiorari denied. *Harold H. Fuhrman* and *Stewart G. Honeck* for petitioner. *Harry G. Slater, Richard F. Maruszewski* and *John F. Cook* for the City of Milwaukee, respondent. Reported below: 16 Wis. 2d 206, 114 N. W. 2d 493.

No. 385. DULL *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 242 Ind. 633, 180 N. E. 2d 523.

No. 389. DILLARD *v.* JACKSON'S ATLANTA READY MIX CONCRETE CO., INC. Court of Appeals of Georgia. Certiorari denied. *G. Seals Aiken* for petitioner. *Hosea Alexander Stephens* for respondent. Reported below: 105 Ga. App. 607, 125 S. E. 2d 656.

No. 391. UNITED STATES *v.* TOBIN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. *Thomas E. Dewey, Everett I. Willis, Lino A. Graglia* and *Sidney Goldstein* for respondent. Reported below: 113 U. S. App. D. C. 110, 306 F. 2d 270.

No. 400. GOLDBERG *v.* UNITED STATES ET AL. Motion of Philadelphia Electric Co. to be added as a party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Victor Hugo Wright* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum* for the United States et al. *Vincent P. McDevitt* and *Eugene J. Bradley* for Philadelphia Electric Co.

No. 393. PHOENIX ASSURANCE CO. OF NEW YORK *v.* CITY OF BUCKNER, MISSOURI, ET AL. Motion of respondent City of Buckner to assess damages and petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *Rodger J. Walsh* for petitioner. *Clay C. Rogers* for the City of Buckner, and *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the Housing & Home Finance Administrator, respondents. Reported below: 305 F. 2d 54.

No. 394. COMMISSIONER OF INTERNAL REVENUE *v.* KUNTZ, EXECUTRIX. Motion to dispense with printing response to petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Wayne G. Barnett* for petitioner. Respondent *pro se*. Reported below: 300 F. 2d 849.

No. 395. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF OLSEN ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Wayne G. Barnett* for petitioner. *Leland W. Scott* for respondents. Reported below: 302 F. 2d 671.

No. 396. UNITED STATES *v.* FRANKEL, EXECUTRIX. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Wayne G. Barnett* for the United States. *J. M. George* for respondent. Reported below: 302 F. 2d 666.

No. 384. JOHNSON, ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 302 F. 2d 86.

No. 503, Misc. COLLINS *v.* HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 390. WIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *A. K. Black* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 304 F. 2d 876.

No. 471. SMITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *William R. Spofford* and *Charles I. Thompson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Wayne G. Barnett* for respondent. Reported below: 305 F. 2d 778.

No. 504. MARTIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *Thomas S. Weary* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Wayne G. Barnett* for respondent. Reported below: 305 F. 2d 290.

No. 88, Misc. ELLIS *v.* WIMAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondents.

Rehearing Denied.

No. 505, October Term, 1960. COTA *v.* CALIFORNIA, 364 U. S. 921. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

No. 554, October Term, 1961. ROBINSON *v.* CALIFORNIA, 370 U. S. 660. The motion of American Civil Liberties Union of Southern California for leave to file brief, as *amicus curiae,* is granted. Petition for rehearing denied.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

On June 25, 1962, this Court reversed appellant's conviction of the offense of being "addicted to the use of narcotics," 370 U. S. 660. Thereafter the State of California filed an alternate petition for rehearing and for an abatement of the judgment, advising the Court for the first time that appellant had died on August 5, 1961, some 10 days prior to the filing here of his jurisdictional statement. Today the Court denies the petition and by its action the mandate, which has been stayed, will now go down. In my view this action by the Court is but a meaningless gesture utterly useless in the disposition of the case—the appellant being dead—and, as I read our cases, is contrary to the general policy this Court has always followed in the issuance of its mandates.

Under our decisions this appeal abated as moot upon the death of the appellant, *Menken* v. *Atlanta,* 131 U. S. 405 (1889), and the judgment should have been vacated and the case remanded to the state court for such proceedings as might be appropriate under state law. This is true even though the opinion and judgment of June 25 had been handed down prior to the notice of appellant's

death. See *Stewart* v. *Southern R. Co.*, 315 U. S. 784 (1942), vacating the prior judgment in the same case, 315 U. S. 283. Moreover, there is no question of costs involved here as there was in *Wetzel* v. *Ohio*, *ante*, p. 62. I would therefore grant the petition for rehearing and vacate the judgment as moot.

A. L. Wirin and *Fred Okrand* on the motion of American Civil Liberties Union of Southern California.

No. 270. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* UNITED STATES, *ante*, p. 861. Petition for rehearing denied.

No. 100. HARRIS *v.* FLORIDA REAL ESTATE COMMISSION ET AL., *ante*, p. 7;

No. 103. JOHNSON *v.* TEXAS, *ante*, p. 828;

No. 105. READEY ET AL. *v.* ST. LOUIS COUNTY WATER CO. ET AL., *ante*, p. 8;

No. 149. HARLOW ET AL. *v.* UNITED STATES, *ante*, p. 814;

No. 154. RICHARDSON *v.* BRUNNER ET AL., *ante*, p. 815;

No. 156. HOUSTON *v.* UNITED STATES, *ante*, p. 815;

No. 160. LA MAUR, INC., *v.* L. S. DONALDSON CO. ET AL., *ante*, p. 815;

No. 301. WEIGEL *v.* PARTENWEEDEREI ET AL., *ante*, p. 830; and

No. 293, Misc. BIGGS *v.* ACME FURNACE FITTING CO. ET AL., *ante*, p. 853. Petitions for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of these applications.

No. 267. MID-AMERICA TELEPHONE CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL., *ante*, p. 831. Motion to dispense with printing the petition for rehearing granted. Petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion and application.

NOVEMBER 14, 1962.

Dismissal Under Rule 60.

No. 381. BATTAGLIA *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *Theodore R. Kupferman* and *Sol Schwartz* for petitioner. Reported below: 303 F. 2d 683.

NOVEMBER 19, 1962.

Miscellaneous Orders.

No. 119. MURRAY ET AL. *v.* CURLETT ET AL., CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY. Certiorari, *ante*, p. 809, to the Court of Appeals of Maryland; and

No. 142. SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL. *v.* SCHEMPP ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. (Probable jurisdiction noted, *ante*, p. 807.) The motion of the American Jewish Committee et al. for leave to file brief, as *amici curiae*, is granted. *Theodore Leskes, Edwin J. Lukas, Arnold Forster, Paul Hartman* and *Sol Rabkin* on the motion.

No. 403. BANCO NACIONAL DE CUBA *v.* SABBATINO, RECEIVER, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 608, Misc. THOMAS *v.* HERITAGE, WARDEN; and

No. 627, Misc. LEE *v.* HERITAGE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 337, Misc. FORAN *v.* MAXWELL, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se.* *Mark McElroy,* Attorney General of Ohio, and *John J. Connors, Jr.,* Assistant Attorney General, for respondent.

Certiorari Granted.

No. 414. SHENKER *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 3d Cir. Certiorari granted. *Charles Alan Wright* and *John Ruffalo* for petitioner. *H. Fred Mercer* for respondent. Reported below: 303 F. 2d 596.

No. 404. NATIONAL LABOR RELATIONS BOARD *v.* GENERAL MOTORS CORP. Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Aloysius F. Power* and *Harry S. Benjamin, Jr.* for respondent. *J. Albert Woll, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* in support of the petition. Reported below: 303 F. 2d 428.

No. 419. LOCAL LODGE No. 1836, DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* LOCAL No. 1505, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. 1st Cir. Certiorari granted. The Solicitor General is invited to file a brief setting forth the views of the United States. *Robert M. Segal* and *Plato E. Papps* for petitioners. *Paul F. Hannah* for Raytheon Company, respondent. Reported below: 304 F. 2d 365.

No. 405. UNITED STATES *v.* PIONEER AMERICAN INSURANCE CO. ET AL. Supreme Court of Arkansas. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph Kovner* and *George F. Lynch* for the United States. Reported below: 235 Ark. 267, 357 S. W. 2d 653.

No. 424. WATSON ET AL. *v.* CITY OF MEMPHIS ET AL. C. A. 6th Cir. Certiorari granted. *Jack Greenberg, Constance Baker Motley* and *H. T. Lockard* for petitioners. *J. S. Allen, Walter Chandler* and *Frank B. Gianotti, Jr.* for respondents. Reported below: 303 F. 2d 863.

No. 211, Misc. WHITE *v.* MARYLAND. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of Maryland granted limited to the point of law raised in *Hamilton* v. *Alabama*, 368 U. S. 52. Case transferred to the appellate docket. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Robert F. Sweeney*, Assistant Attorney General, for respondent. Reported below: 227 Md. 615, 177 A. 2d 877.

No. 368. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL. *v.* SCHERMERHORN ET AL. Supreme Court of Florida. Certiorari granted. *S. G. Lippman, Tim L. Bornstein, Russell Specter* and *Claude Pepper* for petitioners. *Bernard B. Weksler* for respondents. Reported below: 141 So. 2d 269.

Certiorari Denied. (*See also No. 507, Misc., ante, p. 114, and No. 337, Misc., supra.*)

No. 409. WAKSMUNDZKA *v.* TERRY ET AL. Motion to dispense with printing the petition granted. Petition for writ of certiorari to the Supreme Court of Florida denied. Reported below: 139 So. 2d 552.

No. 144. HEAD ET AL. *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Douglas C. Stone* for petitioners. *Joe T. Patterson*, Attorney General of Mississippi, and *G. Garland Lyell, Jr.*, Assistant Attorney General, for respondent. Reported below: — Miss. —, 136 So. 2d 619.

No. 388. ERIE STONE CO. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Ross W. Shumaker* and *John J. Kendrick* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: 304 F. 2d 331.

No. 402. SOLO PRODUCTS CORP. *v.* FEATHERCOMBS, INC. C. A. 2d Cir. Certiorari denied. *Floyd H. Crews* for petitioner. Reported below: 306 F. 2d 251.

No. 406. POWELL *v.* MAHER, TRUSTEE IN BANKRUPTCY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bolling R. Powell, Jr.*, petitioner, *pro se*. *Roger Robb* for respondent. Reported below: 113 U. S. App. D. C. 256, 307 F. 2d 397.

No. 416. IN RE ALFORD. Court of Customs and Patent Appeals. Certiorari denied. *Charles Hieken* and *David Wolf* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for the Commissioner of Patents, in opposition. Reported below: 49 C. C. P. A. (Pat.) 1003, 300 F. 2d 929.

No. 417. PINDER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jacob Kossman* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 305 F. 2d 158.

No. 418. NICHOLS & COMPANY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frank J. Delany* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for the United States. Reported below: 156 Ct. Cl. —.

No. 420. GHIOTO ET AL. *v.* HAMPTON ET AL. C. A. 5th Cir. Certiorari denied. *Elmer E. Hazard* for petitioners. Reported below: 304 F. 2d 320.

No. 421. GOYA FOODS, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Morton Singer* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 303 F. 2d 442.

No. 423. GLYNN *v.* DUBIN, ALIAS DOCTORMAN, ET AL. Supreme Court of Utah. Certiorari denied. Petitioner *pro se*. *Arthur H. Nielsen* for respondents. Reported below: 13 Utah 2d 163, 369 P. 2d 930.

No. 411. O'CONNELL ET AL. *v.* UNITED STATES; and No. 412. LAWTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. *C. Keefe Hurley* and *Stanley H. Rudman* for petitioners in No. 411. *James R. DeGiacomo* for petitioner in No. 412. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 306 F. 2d 523.

No. 124. ATLAS SCRAPER & ENGINEERING CO. *v.* PURSCHE. C. A. 9th Cir. Certiorari denied. *R. Welton Whann* and *Robert M. McManigal* for petitioner. *Lewis E. Lyon* and *John B. Young* for respondent. Reported below: 300 F. 2d 467.

No. 486. VULCAN MATERIALS CO. *v.* SAUBER, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 7th Cir. Certiorari denied. *Forest D. Siefkin* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondents. Reported below: 306 F. 2d 65.

No. 422. CITY OF KANSAS CITY, MISSOURI, *v.* FEDERAL PACIFIC ELECTRIC CO. ET AL. Motion of petitioner for leave to amend the petition for certiorari granted. Motion of Westinghouse Electric Corp. et al. for leave to file brief, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *Keith Wilson, Jr.* for petitioner. *Ralph M. Jones* and *Charles B. Blackmar* for General Electric Co., respondent. *Leo A. Larkin, Charles S. Rhyne, Lenox G. Cooper, John C. Melaniphy, David Berger* and *J. Elliott Drinard* for the National Institute of Municipal Law Officers, as *amicus curiae*, in support of the petition. *Richard S. Righter, Carl E. Enggas* and *John H. Pickering* for Westinghouse Electric Corp. et al., as *amici curiae*, in opposition. Reported below: 310 F. 2d 271.

No. 35, Misc. READE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Robert R. Granucci* and *John S. McInerny*, Deputy Attorneys General, for respondent.

No. 89, Misc. RATTEN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Assistant Attorney General, for respondents.

No. 101, Misc. BELANGER *v.* WARDEN, CONNECTICUT STATE PRISON. Superior Court of Connecticut, Hartford County. Certiorari denied.

No. 103, Misc. DRAKE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se.* *Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

No. 186, Misc. MERWIN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 355 S. W. 2d 721.

No. 351, Misc. INDIVIGLIO *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley, Thomas A. Ziebarth* and *Samuel Resnicoff* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for the United States. Reported below: 156 Ct. Cl. ——, 299 F. 2d 266.

No. 195, Misc. MORRIS *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind,* Assistant Attorneys General, for respondent.

No. 504, Misc. RUARK *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Reported below: 150 Colo. ——, 372 P. 2d 158.

No. 185, Misc. PRICE *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey*, Assistant Attorneys General, for respondent.

No. 487, Misc. RIDDLE *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied. Reported below: 57 Cal. 2d 848, 372 P. 2d 304.

No. 102, Misc. MCCANN *v.* WARDEN, CONNECTICUT STATE PRISON. Superior Court of Connecticut, Hartford County. Certiorari denied.

No. 239, Misc. ROBERTS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey*, Assistant Attorneys General, for respondent.

No. 249, Misc. DOLATOWSKI *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 320, Misc. PELLON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Miller*, *Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 304 F. 2d 447.

No. 383, Misc. HANDLEY *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 502, Misc. LARSON *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 367, Misc. BARKAN *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States et al. Reported below: 305 F. 2d 774.

No. 496, Misc. ANDERSON *v.* CHAPPELL ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondents.

No. 498, Misc. DELPIT *v.* NOCUBA SHIPPING CO. ET AL. C. A. 5th Cir. Certiorari denied. *John W. Bryan, Jr.* for petitioner. *Jos. M. Rault* for respondents. Reported below: 302 F. 2d 835.

No. 505, Misc. JAMES *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 515, Misc. GOODWIN *v.* MISSOURI ET AL. Supreme Court of Missouri. Certiorari denied. Reported below: 359 S. W. 2d 601.

No. 518, Misc. JAMISON *v.* O'BRIEN, PAROLES SUPERINTENDENT, ET AL. Circuit Court of Henry County, Illinois. Certiorari denied.

No. 520, Misc. BENTZ *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 523, Misc. SHIMKO *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 535, Misc. ELLIOTT *v.* WARDEN, MARYLAND PENITENTIARY. Baltimore City Court, Maryland. Certiorari denied.

No. 543, Misc. BROWN *v.* WAINWRIGHT (FORMERLY COCHRAN), CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 550, Misc. CRUZ *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 559, Misc. GOBIE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 597, Misc. JACKSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 229, Misc. POLITES *v.* SAHLI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George W. Crockett, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 302 F. 2d 449.

No. 458, Misc. WALLACE *v.* DISTRICT OF COLUMBIA PAROLE BOARD ET AL. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondents.

Rehearing Denied.

No. 138. PIERCE, EXECUTRIX, *v.* ALLEN B. DUMONT LABORATORIES, INC., *ante*, p. 814;

No. 169. MADDOX *v.* FIDELITY INVESTMENT & TITLE CO., INC., ET AL., *ante*, p. 816;

No. 204. HACKETT *v.* UNITED STATES, *ante*, p. 819;

No. 216. REAL ESTATE CORP., INC., *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 822;

No. 268. MADDOX *v.* SHROYER ET AL., *ante*, p. 825;

No. 279. ANSPACH ET AL. *v.* UNITED STATES, *ante*, p. 826;

No. 79, Misc. HUCKS *v.* UNITED STATES, *ante*, p. 835;

No. 142, Misc. PUDDU *v.* ROYAL NETHERLANDS STEAMSHIP CO., *ante*, p. 840;

No. 158, Misc. PERRY *v.* OHIO, *ante*, p. 853; and

No. 259, Misc. BLACK *v.* MOORE, WARDEN, *ante*, p. 849.

Petitions for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of these applications.

NOVEMBER 30, 1962.

Miscellaneous Order.

No. 765, Misc. MCGEE *v.* EYMAN, PRISON SUPERINTENDENT. Motion for leave to file petition for writ of certiorari denied.

DECEMBER 3, 1962.

Miscellaneous Orders.

No. 654, Misc. WILSON *v.* MACBRIDE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied.

No. 571, Misc. LEE *v.* PRUITT, JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

No. 23, Misc., October Term, 1959. IN RE DISBARMENT OF ALKER. The petition to vacate order of disbarment and reinstate order of suspension, pending action of the United States Court of Appeals for the Third Circuit, is denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Francis E. Walter* and *William J. Woolston* on the petition.

No. 598, Misc. IN RE DISBARMENT OF GATELY. It having been reported to the Court that John H. Gately, of Colorado Springs, State of Colorado, has been disbarred from the practice of law in all the courts of the State of Colorado by judgment of the Supreme Court of the State of Colorado, duly entered on the 24th day of July, A. D., 1961, and this Court by order of October 15, 1962, having suspended the said John H. Gately from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, who has filed a return thereto; now, upon consideration of the rule to show cause and the return aforesaid;

IT IS ORDERED that the said John H. Gately be, and he is hereby, disbarred, and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 619, Misc. EX PARTE SCHLETTE;

No. 630, Misc. PERRY *v.* MAXWELL, WARDEN; and

No. 658, Misc. VERSCHOOR *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 438. UNITED STATES *v.* SINGER MANUFACTURING CO. Appeal from the United States District Court for the Southern District of New York. Probable jurisdic-

tion noted. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Robert B. Hummel* for the United States. *Edwin J. Wesely* and *Edward A. Miller* for appellee. Reported below: 205 F. Supp. 394.

Certiorari Granted. (*See also No. 222, ante, p. 184.*)

No. 401. MOSELEY, DOING BUSINESS AS MOSELEY PLUMBING & HEATING CO., *v.* ELECTRONIC & MISSILE FACILITIES, INC., ET AL. C. A. 5th Cir. Certiorari granted. *T. Baldwin Martin* for petitioner. *Lamar W. Sizemore* for respondents. Reported below: 306 F. 2d 554.

No. 464. UNITED STATES *v.* MUNIZ ET AL. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Morton Hollander* for the United States. *Charles Andrews Ellis* for respondent Muniz. Reported below: 305 F. 2d 253, 285.

No. 105, Misc. RIDEAU *v.* LOUISIANA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Louisiana granted. Case transferred to the appellate docket. Petitioner *pro se*. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *Weldon A. Cousins, M. E. Culligan, Wm. P. Schuler* and *Dorothy D. Wolbrette*, Assistant Attorneys General, for respondent. Reported below: 242 La. 431, 137 So. 2d 283.

No. 296, Misc. CAMPBELL ET AL. *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted. Case transferred to the appellate docket. *Melvin S. Louison, Leonard Louison* and *Lawrence F. O'Donnell* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 296 F. 2d 527; 303 F. 2d 747.

Certiorari Denied. (*See also No. 426, ante, p. 184; No. 442, ante, p. 185; No. 470, ante, p. 185; and No. 452, Misc., ante, p. 186.*)

No. 383. COPPOLLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 306 F. 2d 308.

No. 413. MILES LUMBER CO. *v.* HARRISON & GRIMSHAW CONSTRUCTION CO. ET AL. C. A. 10th Cir. Certiorari denied. *Robert B. Langworthy* for petitioner. *John H. Cantrell* and *Remington Rogers* for certain named respondents. Reported below: 305 F. 2d 363.

No. 427. VANACEK *v.* ST. LOUIS PUBLIC SERVICE CO. Supreme Court of Missouri. Certiorari denied. *William L. Weiss* and *William L. Mason, Jr.* for petitioner. *William M. Corrigan* and *George P. Bowie* for respondent. Reported below: 358 S. W. 2d 808.

No. 428. CHRISTIAN ET AL. *v.* JEMISON ET AL. C. A. 5th Cir. Certiorari denied. *John V. Parker* and *F. W. Middleton, Jr.* for petitioners. Reported below: 303 F. 2d 52.

No. 431. HARDCASTLE ET AL. *v.* WESTERN GREYHOUND LINES ET AL. C. A. 9th Cir. Certiorari denied. *Jay A. Darwin* for petitioners. *Marion B. Plant* for Western Greyhound Lines, and *Duane B. Beeson* for Rhodes et al., respondents. Reported below: 303 F. 2d 182.

No. 433. CITY TRANSPORTATION CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *W. D. White* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 303 F. 2d 299.

No. 432. THOMPSON *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *W. G. Pearson II, Le Marquis De Jarmon* and *C. O. Pearson* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, and *Charles D. Barham, Jr.,* Assistant Attorney General, for respondent. Reported below: 257 N. C. 452, 126 S. E. 2d 58.

No. 434. ROUMELIOTIS ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Francis S. Clamitz* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 304 F. 2d 453.

No. 436. STRACHAN SHIPPING CO. *v.* KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V. C. A. 5th Cir. Certiorari denied. *E. D. Vickery* for petitioner. *William M. Kimball, Eugene Underwood* and *Clarence S. Eastham* for respondent. Reported below: 301 F. 2d 741; 304 F. 2d 545.

No. 439. BELCHER ET AL. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Al G. Rives* and *Erle Pettus, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Norman H. Wolfe* for respondent. Reported below: 302 F. 2d 289.

No. 446. CASTELLI, ALIAS GAGLIANO, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Elmer Fried* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 306 F. 2d 640.

No. 440. JIFFY ENTERPRISES, INC., *v.* SEARS ROEBUCK & CO. ET AL. C. A. 3d Cir. Certiorari denied. *Arthur H. Seidel* and *Marvin Comisky* for petitioner. *Cedric W. Porter, Henry N. Paul, Jr.* and *Robert B. Frailey* for respondents. Reported below: 306 F. 2d 240.

No. 441. HUFF ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Nathan Witt* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 301 F. 2d 760.

No. 443. TURNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *H. Clyde Pearson* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondent. Reported below: 303 F. 2d 94.

No. 444. ROBERTSON LUMBER CO. *v.* CONTINENTAL CASUALTY CO. C. A. 8th Cir. Certiorari denied. *Harold D. Shaft* for petitioner. *Thomas L. Degnan* for respondent. Reported below: 305 F. 2d 794.

No. 447. VALLEY MORRIS PLAN, FORMERLY STOCKTON MORRIS PLAN CO., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Harold J. Willis* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for respondent. Reported below: 305 F. 2d 610.

No. 448. KRAVITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Leon H. Kline* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *John M. Brant* for the United States. Reported below: 303 F. 2d 700.

No. 450. MAHLER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert A. Cohen* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 306 F. 2d 713.

No. 453. IN RE ALKER. C. A. 3d Cir. Certiorari denied. *Francis E. Walter, Robert M. Taylor* and *James J. Regan, Jr.* for petitioner. Reported below: 307 F. 2d 880.

No. 454. SOCONY MOBIL OIL CO., INC., ET AL. *v.* WALL STREET TRADERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Robert Eikel, George W. Renaudin* and *L. J. Benckenstein* for petitioners. *Richard Gyory* and *Herman E. Cooper* for respondents. Reported below: 304 F. 2d 717.

No. 455. LYONS *v.* GILLILAND. C. A. 9th Cir. Certiorari denied. *Morris Lavine* and *Welburn Mayock* for petitioner. *George R. Larwill* for respondent. Reported below: 303 F. 2d 452.

No. 457. CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION ET AL. *v.* HEAVY, HIGHWAY, BUILDING & CONSTRUCTION TEAMSTERS COMMITTEE FOR NORTHERN CALIFORNIA ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. *Robert M. Adams, Jr.* and *Scott Elder* for petitioners. *David Previant, Duane B. Beeson* and *Florian Bartosic* for respondents. Reported below: 203 Cal. App. 2d 665, 21 Cal. Rptr. 840.

No. 461. DENTON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 307 F. 2d 336.

No. 459. BROWNFIELD *v.* LANDON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Byron N. Scott* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Morton Hollander* and *Kathryn H. Baldwin* for respondent. Reported below: 113 U. S. App. D. C. 248, 307 F. 2d 389.

No. 462. ALABAMA POWER CO. ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *A. J. G. Priest, Joseph M. Farley, Edwin J. Wesely, Frank Snell, Daniel James, William H. Schroder, Major T. Bell, Andrew P. Carter, Garner W. Green, Sam B. Chase, Bradford S. Magill, Richard H. Peterson, Vincent P. McDevitt, Eugene J. Bradley, Cornelius Means, Wendell W. Black and John W. Riely* for petitioners. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock, Leonard D. Eesley* and *Drexel D. Journey* for respondent. Reported below: 304 F. 2d 29.

No. 465. BEACH, ALIAS HICKEY, *v.* ONEIDA NATIONAL BANK & TRUST CO. OF CENTRAL NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *William B. Collins* for petitioner. *G. Edward LaGatta* for Oneida National Bank & Trust Co. of Central New York, and *Donald Spadone* for McMahon, respondents. Reported below: 305 F. 2d 826.

No. 468. PEKE *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied. *W. Peter McAtee* for petitioner. Reported below: 70 N. M. 108, 371 P. 2d 226.

No. 469. LARKIN, DOING BUSINESS AS LARKIN COMPANY, *v.* PLATT CONTRACTING CO., INC., ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Francis L. Swift* for respondents. Reported below: 306 F. 2d 724.

No. 466. DANIELS & KENNEDY, INC., *v.* A/S INGER ET AL. C. A. 2d Cir. Certiorari denied. *Joseph M. Soviero, Harry Schecter* and *Harold Klein* for petitioner. *Warner Pyne* and *William A. Wilson* for A/S Inger, and *J. Ward O'Neill* and *David P. H. Watson* for Illinois Atlantic Corp., respondents. Reported below: 305 F. 2d 139.

No. 534. MORRIS PLAN CO. OF CALIFORNIA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Julian O. Von Kalinowski* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for respondent. Reported below: 305 F. 2d 610.

No. 538. CAMPISI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 306 F. 2d 308.

No. 467. ALVADO ET AL. *v.* GENERAL MOTORS CORP. Motion to defer consideration of petition for certiorari and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion and petition. *Harry Montgomery Leet, Sidney S. Berman, Frank Montgomery, Sheldon E. Bernstein, Morton Liftin* and *Joseph M. Stone* for petitioners. *Aloysius F. Power* and *George A. Brooks* for respondent. Reported below: 303 F. 2d 718.

No. 62, Misc. LIEBERMAN *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 274, Misc. ODDO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Irving Galt,* Assistant Solicitor General, and *Sheldon Raab,* Deputy Assistant Attorney General, for respondent. Reported below: 10 N. Y. 2d 709, 179 N. E. 2d 716; 11 N. Y. 2d 798, 181 N. E. 2d 854.

No. 312, Misc. FLETCHER *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, *Sam R. Wilson, Irwin R. Salmanson* and *Allo B. Crow,* Assistant Attorneys General, and *Henry Wade* for respondent. Reported below: 171 Tex. Cr. R. 74, 344 S. W. 2d 683.

No. 322, Misc. BRAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 302 F. 2d 58.

No. 326, Misc. DELEVAY *v.* NATIONAL SAVINGS & TRUST CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Arthur P. Drury, John M. Lynham, John E. Powell* and *Henry H. Paige* for respondent.

No. 343, Misc. RUSSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 536, Misc. HUDGENS *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 389, Misc. MIRRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 304 F. 2d 883.

No. 394, Misc. OWENS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 403, Misc. LIEBERMAN *v.* COLUMBUS BAR ASSOCIATION. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se. Lawrence A. Ramey* for respondent. Reported below: 173 Ohio St. 356, 182 N. E. 2d 550.

No. 430, Misc. McDOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 305 F. 2d 12.

No. 463, Misc. CRUZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Frank S. Hogan, H. Richard Uviller* and *Peter J. O'Connor* for respondent. Reported below: 11 N. Y. 2d 840, 182 N. E. 2d 278.

No. 501, Misc. HATSCHNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 305 F. 2d 371.

No. 435, Misc. Ross *v.* Willingham, Warden. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent.

No. 497, Misc. Glover *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 508, Misc. Shorey *v.* Warden, Maryland Penitentiary. Court of Appeals of Maryland. Certiorari denied. Reported below: 227 Md. 385, 177 A. 2d 245.

No. 541, Misc. Lipscomb *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 308 F. 2d 420.

No. 545, Misc. O'Brien *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 547, Misc. Kohlfuss *v.* Warden, Connecticut State Prison. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 551, Misc. Boynton *v.* Ohio. Supreme Court of Ohio. Certiorari denied. Reported below: 173 Ohio St. 526, 184 N. E. 2d 377.

No. 558, Misc. Maldonado *v.* Eyman, Warden, et al. Supreme Court of Arizona. Certiorari denied. Reported below: 92 Ariz. 70, 373 P. 2d 583.

No. 560, Misc. ARCHEY *v.* NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ. Court of Civil Appeals of Texas, Sixth Supreme Judicial District. Certiorari denied. *Arthur J. Mandell* for petitioner. *Carl G. Stearns* for respondent. Reported below: 354 S. W. 2d 688.

No. 561, Misc. SANFORD *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Supreme Court of California. Certiorari denied.

No. 562, Misc. ANDERSON ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 568, Misc. BARNHILL *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied.

No. 570, Misc. SOSTRE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 576, Misc. KAGANOVITCH *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 305 F. 2d 715.

No. 577, Misc. KOSTAL ET AL. *v.* MCNICHOLS ET AL. United States District Court for the District of Colorado. Certiorari denied.

No. 578, Misc. TRANOWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 580, Misc. BATES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 584, Misc. NICHOLSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 544, Misc. MOUNTS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 147 W. Va. —, 126 S. E. 2d 393.

No. 582, Misc. BOGAN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Carman F. Ball* and *Irma R. Thorn* for respondent. Reported below: 16 App. Div. 2d 875.

No. 585, Misc. LUCKY *v.* ANDERSON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Diana K. Powell* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 592, Misc. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 303 F. 2d 775.

No. 595, Misc. HARPER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 612, Misc. SEES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 629, Misc. COOPER *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. Reported below: 149 Conn. 640, 183 A. 2d 612.

No. 222, Misc. ARELLANES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 302 F. 2d 603.

Rehearing Denied.

No. 256. IN RE ESTATE OF HURST, *ante*, p. 862;

No. 317. HARDWARE MUTUAL CASUALTY CO. *v.* MCINTYRE, *ante*, p. 878;

No. 318. UNITED STATES FIDELITY & GUARANTY CO. *v.* HART, *ante*, p. 878;

No. 319. STANDARD ACCIDENT INSURANCE CO. *v.* AGUIRRE, *ante*, p. 878;

No. 110, Misc. JONES *v.* UNITED STATES, *ante*, p. 864; and

No. 327, Misc. CHAVEZ ET AL. *v.* DICKSON, WARDEN, *ante*, p. 880. Petitions for rehearing denied.

DECEMBER 10, 1962.

Miscellaneous Orders.

No. 91. MCLEOD, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, *v.* EMPRESA HONDURENA DE VAPORES, S. A. Certiorari, 370 U. S. 915, to the United States Court of Appeals for the Second Circuit;

No. 93. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO, *v.* EMPRESA HONDURENA DE VAPORES, S. A. Certiorari, 370 U. S. 915, to the United States Court of Appeals for the Second Circuit; and

No. 107. MCCULLOCH, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL. *v.* SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS. Certiorari, 370 U. S. 915, to the United States Court of Appeals for the District of Columbia Circuit. The motion of Canada for leave to file brief, as *amicus curiae*, is granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Robert MacCrate* on the motion.

No. 62. NORTHERN NATURAL GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS. Appeal from the

Supreme Court of Kansas. (Probable jurisdiction noted, 370 U. S. 901.) The motion of Mid-Continent Oil & Gas Association for leave to file brief, as *amicus curiae*, is granted. MR. JUSTICE WHITE took no part in the consideration or decision of this motion. *W. W. Heard* on the motion.

No. 363. GINSBURG *v.* LING, U. S. DISTRICT JUDGE. (Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied, *ante*, p. 889.) The motion of petitioner to remand is denied. *Paul Ginsburg*, petitioner, *pro se*.

No. 565, Misc. LEVER BROTHERS CO. *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Abe Fortas*, *William L. McGovern*, *Abe Krash* and *Dennis G. Lyons* for movant. *Solicitor General Cox*, *Assistant Attorney General Loevinger* and *Lionel Kestenbaum* for the United States.

Certiorari Granted.

No. 463. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, *v.* UNITED STATES LINES CO. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to the following question:

"1. Does a seaman have a right to a jury trial on a claim for unpaid maintenance and cure when joined with a claim for Jones Act negligence?"

Jacob Rassner for petitioner. *Matthew L. Danahar* and *Charles N. Fiddler* for respondent. Reported below: 306 F. 2d 461.

No. 480. McNEESE ET AL. *v.* BOARD OF EDUCATION FOR SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted. *John W. Rogers* and *Earl E. Strayhorn* for petitioners. Reported below: 305 F. 2d 783.

No. 476. BRAUNSTEIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to the following question:

"1. Whether Section 117 (m) of the Internal Revenue Code of 1939, which provides that gain 'from the sale or exchange . . . of stock of a collapsible corporation' is taxable as ordinary income rather than capital gain, is inapplicable in circumstances where the stockholders would have been entitled to capital gains treatment had they conducted the enterprise in their individual capacities without utilizing a corporation."

Thurman Arnold, Louis Eisenstein and *Julius M. Greisman* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Harry Baum* for respondent. Reported below: 305 F. 2d 949.

Certiorari Denied.

No. 458. WIMAN, WARDEN, ET AL. *v.* ARGO. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for petitioners. Reported below: 308 F. 2d 674.

No. 484. GALLO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *David F. Price* for petitioner. *Edward S. Silver* and *Aaron E. Koota* for respondent. Reported below: 10 N. Y. 2d 1024, 180 N. E. 2d 433; 11 N. Y. 2d 769, 181 N. E. 2d 764.

No. 475. SAMUELS, TRUSTEE, *v.* KOCKOS BROTHERS, LTD. C. A. 9th Cir. Certiorari denied. *Allen M. Singer* for petitioner. Reported below: 307 F. 2d 147.

No. 477. CITY OF PHILADELPHIA *v.* COHEN. Court of Appeals of New York. Certiorari denied. *Mortimer B. Wolf, David Berger* and *Shirley Fingerhood* for petitioner. *John L. Freeman* for respondent. *Leo A. Larkin, Stanley Buchsbaum* and *Morris L. Heath* for the City of New York, as *amicus curiae,* in support of the petition. Reported below: 11 N. Y. 2d 401, 184 N. E. 2d 167.

No. 478. STRATTON ET AL. *v.* DALY. C. A. 7th Cir. Certiorari denied. *William G. Clark,* Attorney General of Illinois, and *William C. Wines, Raymond S. Sarnow, A. Zola Groves* and *Edward A. Berman,* Assistant Attorneys General, for petitioners. Reported below: 304 F. 2d 666.

No. 495. INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* CENTRAL AIRLINES, INC. Court of Civil Appeals of Texas, Second Supreme Judicial District. Certiorari denied. *Charles J. Morris* and *Plato E. Papps* for petitioners. *Luther Hudson* for respondent. Reported below: 355 S. W. 2d 803.

No. 497. MALAT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Morton K. Rothschild* for respondent. Reported below: 302 F. 2d 700.

No. 501. HIGH FIDELITY RECORDINGS, INC., *v.* AUDIO FIDELITY, INC. C. A. 9th Cir. Certiorari denied. *John Joseph Hall* for petitioner. *Ford W. Harris, Jr.* for respondent. Reported below: 305 F. 2d 86.

No. 498. VON HARDENBERG ET AL. *v.* KENNEDY, ATTORNEY GENERAL. Supreme Court of Illinois. Certiorari denied. *Roland Towle* and *Thomas P. Sullivan* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Sherman L. Cohn* for respondent. Reported below: 25 Ill. 2d 151, 183 N. E. 2d 505.

No. 488. GUNDERSON BROS. ENGINEERING CORP. *v.* MERRITT-CHAPMAN & SCOTT CORP. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK believe that certiorari should be granted to consider whether the petitioner Gunderson Bros. Engineering Corp. has been denied its right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States. *William F. White* for petitioner. *Benjamin H. Kizer* for respondent. Reported below: 305 F. 2d 659.

No. 496. 222 EAST CHESTNUT STREET CORP. ET AL. *v.* WEINER ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application. *Wesley G. Hall* for petitioners. Reported below: 303 F. 2d 630.

No. 556, Misc. RINIERI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 308 F. 2d 24.

No. 590, Misc. MONT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 306 F. 2d 412.

No. 481. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, FRIGIDAIRE LOCAL 801, *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Benjamin C. Sigal* and *David S. Davidson* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 113 U. S. App. D. C. 342, 307 F. 2d 679.

No. 476, Misc. GAINES *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 158 Ct. Cl. —.

No. 659, Misc. ALLISON *v.* WIMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se. MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 274 Ala. 150, 145 So. 2d 846.

Rehearing Denied.

No. 410. JACKSON BREWING CO. *v.* CLARKE, *ante,* p. 891;

No. 475, Misc. JACKSON BREWING CO. *v.* CONNALLY, U. S. DISTRICT JUDGE, *ante,* p. 885;

No. 478, Misc. LEVINE *v.* RADIO CORPORATION OF AMERICA ET AL., *ante,* p. 897; and

No. 563, Misc. GLUCKSTERN *v.* NEW YORK, *ante,* p. 899. Petitions for rehearing denied.

No. 77, MISC. STEVENSON *v.* UNITED STATES, *ante,* p. 835. Petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application.

Dismissal Under Rule 60.

No. 730, Misc. CISNEROS *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. Petition dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 57 Cal. 2d 415, 369 P. 2d 714.

DECEMBER 17, 1962.

Miscellaneous Orders.

No. 574. ANDERSON *v.* KENTUCKY. Certiorari, *ante*, p. 886, to the Court of Appeals of Kentucky. It is ordered that Rules 26 and 36 be suspended in this case and the parties proceed on the basis of the certified typewritten record filed with the Court, and it is further ordered that each and every motion heretofore filed by the petitioner and not heretofore acted upon by the Court be denied.

No. 632, Misc. ALCALA *v.* CALIFORNIA. Motion for leave to file petition for writ of certiorari denied.

No. 328, Misc. ROBERTS *v.* CLEMMER, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 213, Misc. BYRNES *v.* WALKER, WARDEN. Motion for leave to file an application for a writ of habeas corpus is hereby transferred "for hearing and determination" to the United States District Court for the Eastern District of Louisiana. 28 U. S. C. § 2241 (b); Rule 31 (5), Revised Rules of the Supreme Court of the United States (1954). Petitioner *pro se*. *Jack P. F. Gremillion*, Attorney General of Louisiana, *M. E. Culligan*, *John E. Jackson, Jr.* and *Scallan E. Walsh*, Assistant Attorneys General, and *Albin P. Lassiter* for respondent.

Probable Jurisdiction Noted.

No. 506. UNITED STATES *v.* BRAVERMAN. Appeal from the United States District Court for the Southern District of California. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 526. SHERBERT *v.* VERNER ET AL., MEMBERS OF SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, ET AL. Appeal from the Supreme Court of South Carolina. Probable jurisdiction noted. *William D. Donnelly* for appellant. *Daniel R. McLeod,* Attorney General of South Carolina, and *Victor S. Evans,* Assistant Attorney General, for appellees. Reported below: 240 S. C. 286, 125 S. E. 2d 737.

Certiorari Granted. (*See also No. 435, ante, p. 215.*)

No. 509. REED *v.* THE YAKA ET AL. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* for petitioner. *Thomas F. Mount* for the Yaka, and *T. E. Byrne, Jr.* for Pan-Atlantic Steamship Corp., respondents. Reported below: 307 F. 2d 203.

No. 515. HARSHMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Francis Heisler* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 307 F. 2d 590.

No. 516. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Francis Heisler* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 307 F. 2d 585.

No. 529. UNITED STATES *v.* CARLO BIANCHI & CO., INC. Court of Claims. Certiorari granted. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for the United States. *William H. Matthews* and *Robert W. Knox* for respondent. Reported below: 157 Ct. Cl. —.

No. 482. LOCAL No. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS UNION, ET AL. *v.* PERKO. Supreme Court of Ohio. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *David E. Feller, Jerry D. Anker* and *Joseph Schiavoni* for petitioners. *Martin S. Goldberg* for respondent. Reported below: 168 Ohio St. 161, 151 N. E. 2d 742; 171 Ohio St. 68, 167 N. E. 2d 903; 173 Ohio St. 576, 184 N. E. 2d 100.

No. 541. LOCAL 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES, *v.* BORDEN. Motion of respondent for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Civil Appeals of Texas, Fifth Supreme Judicial District, granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion and petition. *L. N. D. Wells, Jr.* for petitioner. *Ewell Lee Smith, Jr.* for respondent. Reported below: 355 S. W. 2d 729.

No. 374, Misc. SMITH *v.* MISSISSIPPI. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Mississippi granted. Case transferred to the appellate docket. *Melvin L. Wulf, Rowland Watts* and *William L. Higgs* for petitioner. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, for respondent. Reported below: — Miss. —, 139 So. 2d 857.

Certiorari Denied. (*See also No. 626, Misc., ante, p. 222.*)

No. 505. MILLER ET AL. *v.* EAST GEORGIA MOTORS, INC. C. A. 4th Cir. Certiorari denied. *H. Wayne Unger* for petitioners. *B. Allston Moore, Jr.* for respondent. Reported below: 303 F. 2d 488.

No. 510. TEXAS CARBONATE CO. *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Nat L. Hardy* and *Robt. H. Rice* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harold M. Seidel* for respondent. Reported below: 307 F. 2d 289.

No. 518. CROWE, TRADING AS WILLIAM A. CROWE CO., *v.* RAGNAR BENSON, INC. C. A. 3d Cir. Certiorari denied. *Vincent M. Casey* for petitioner. *Samuel L. Goldstein* for respondent. Reported below: 307 F. 2d 73.

No. 519. MOORE-MCCORMACK LINES, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *J. A. Dickinson* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States. Reported below: 157 Ct. Cl. —, 301 F. 2d 342.

No. 521. GENERAL ELECTRIC CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *C. Rudolf Peterson* and *John P. Lipscomb* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Marselli* for the United States. Reported below: 156 Ct. Cl. —, 299 F. 2d 942.

No. 524. IN RE MOITY. Supreme Court of Louisiana. Certiorari denied.

No. 514. ODDIE ET AL. *v.* ROSS GEAR & TOOL CO., INC. C. A. 6th Cir. Certiorari denied. *Harold A. Cranefield* and *John A. Fillion* for petitioners. *Owen J. Neighbours* and *James M. Nicholson* for respondent. Reported below: 305 F. 2d 143.

No. 522. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA ET AL. *v.* LUTES ET AL. C. A. 10th Cir. Certiorari denied. *Peyton Ford* for petitioners. *Dale M. Stucky* for respondents. Reported below: 306 F. 2d 948; 308 F. 2d 574.

No. 523. MORGAN ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Marvin J. Sonosky* and *J. Reuel Armstrong* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for Udall, and *Harry M. Edelstein* for Wallis, respondents. Reported below: 113 U. S. App. D. C. 192, 306 F. 2d 799.

No. 525. LOEHDE ET UX. *v.* WISCONSIN RIVER POWER CO. ET AL. C. A. 7th Cir. Certiorari denied. *Richard P. Tinkham, Jr.* for petitioners. *Theo. W. Brazeau* and *Richard S. Brazeau* for respondents. Reported below: 304 F. 2d 433.

No. 723, Misc. PIKE *v.* CALIFORNIA; and

No. 724, Misc. CENICEROS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Russell E. Parsons* for petitioners. Reported below: 58 Cal. 2d 70, 372 P. 2d 656.

No. 99, Misc. PALUMBO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 527. COMPANIA ANONIMA VENEZOLANA DE NAVEGACION *v.* A. J. PEREZ EXPORT CO. ET AL. C. A. 5th Cir. Certiorari denied. *James J. Morrison* for petitioner. *Samuel C. Gainsburgh* and *Raymond H. Kierr* for respondents. Reported below: 303 F. 2d 692.

No. 472. OVE GUSTAVSSON CONTRACTING CO., INC., *v.* BROWNE & BRYAN LUMBER CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Anthony B. Cataldo* for petitioner. *Philip G. Fitz* and *William V. Homans* for Browne & Bryan Lumber Co., Inc., respondent. Reported below: 303 F. 2d 823.

No. 358, Misc. FOX *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. Petitioner *pro se*. *Edward J. McCormack, Jr.*, Attorney General of Massachusetts, and *Robert J. DeGiacomo*, Assistant Attorney General, for respondent.

No. 586, Misc. AKERS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 645, Misc. DAVIS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 652, Misc. HENDERSON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *A. P. Tureaud* for petitioner. Reported below: 243 La. 233, 142 So. 2d 407.

Rehearing Denied.

No. 330. CITIZENS UTILITIES CO. OF CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA FOR SACRAMENTO COUNTY ET AL., *ante*, p. 67. Petition for rehearing denied.

No. 365. GREENHILL *v.* UNITED STATES, *ante*, p. 891;

No. 195, Misc. MORRIS *v.* BETO, CORRECTIONS DIRECTOR, *ante*, p. 913;

No. 247, Misc. MILLER *v.* PATE, WARDEN, *ante*, p. 898;

No. 281, Misc. TAYLOR *v.* UNITED STATES, *ante*, p. 894;

No. 330, Misc. THREATT *v.* UNITED STATES, *ante*, p. 896;

No. 477, Misc. GIAGNOCAVO *v.* AMERICAN CAN CO., *ante*, p. 897; and

No. 519, Misc. MCCONNON ET AL. *v.* RAOUL-DUVAL ET AL., *ante*, p. 898. Petitions for rehearing denied.

DECEMBER 26, 1962.

Dismissal Under Rule 60.

No. 449. FAHY ET AL. *v.* CONNECTICUT. On petition for writ of certiorari to the Supreme Court of Errors of Connecticut. Petition as to petitioner Arnold dismissed pursuant to Rule 60 of the Rules of this Court. *S. Floyd Nagle* and *John J. Sullivan* for petitioner Arnold. *Lorin W. Willis* for respondent. Reported below: 149 Conn. 577, 183 A. 2d 256.

JANUARY 7, 1963.

Miscellaneous Orders.

No. 10, Original. VIRGINIA *v.* MARYLAND. The report of the Special Master is received, approved and ordered filed. In view of the suggestion of the parties and the recommendation of the Special Master that the case has been settled and is now moot, the bill of complaint is dismissed. The costs in this case are to be equally divided between the parties. The Special Master, having completed all of his duties, is hereby discharged. [For previous decision and order of the Court, see 355 U. S. 269, 946.]

No. 119. MURRAY ET AL. *v.* CURLETT ET AL., CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY. Certiorari, *ante*, p. 809, to the Court of Appeals of Maryland; and

No. 142. SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL. *v.* SCHEMPP ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. (Probable jurisdiction noted, *ante*, p. 807.) The motion of the American Ethical Union for leave to file a brief, as *amicus curiae*, is granted. *Herbert A. Wolff* and *Leo Rosen* on the motion.

No. 430. ARROW TRANSPORTATION CO. ET AL. *v.* SOUTHERN RAILWAY CO. ET AL. Certiorari, *ante*, p. 859, to the United States Court of Appeals for the Fifth Circuit. The motions of Statesville Flour Mills, Walley Milling Co., Southern Governors' Conference et al. and the National Association of Railroad & Utilities Commissioners for leave to file briefs, as *amici curiae*, are granted. *Whiteford S. Blakeney* on the motion for Statesville Flour Mills. *John W. Vardaman* on the motion for Walley Milling Co. *Eugene Cook*, Attorney General of Georgia, *Paul Rodgers*, Assistant Attorney General, and *Walter R. McDonald* on the motion for Southern Governors' Conference et al. *Austin L. Roberts, Jr.* and *R. Everette Kreeger* on the motion for the National Association of Railroad & Utilities Commissioners.

No. 449, Misc. KIRK *v.* SHERIFF OF LOS ANGELES COUNTY. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *William E. James*, Assistant Attorney General, for respondent.

No. 54. WHITE MOTOR CO. *v.* UNITED STATES. Appeal from the United States District Court for the Northern District of Ohio. (Probable jurisdiction noted, 369 U. S. 858). The motions of Serta Associates, Inc., et al. and Sandura Company for leave to file briefs, as *amici curiae*, are granted. *Sigmund Timberg* on the motion for Serta Associates, Inc., et al. *John Bodner, Jr.* on the motion for Sandura Company.

No. 346. SANTA MARIA SHIPOWNING & TRADING CO., S. A., ET AL. *v.* PANTELOGLOU ET AL. (Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied, *ante*, p. 889.) The motion for damages and to stay issuance of the mandate of the Court of Appeals is denied. *Edward B. Joachim* for respondents on the motion. *Robert C. Thomson, Jr.* for petitioners, in opposition.

No. 700, Misc. KIRSCH *v.* PATE, WARDEN; and
No. 741, Misc. CONTALDO *v.* MURPHY, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 482, Misc. WILSON *v.* SOUTH CAROLINA ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Daniel R. McLeod*, Attorney General of South Carolina, and *Clarence T. Goolsby, Jr.*, Assistant Attorney General, for respondents.

No. 680, Misc. KIMBRO *v.* BOMAR, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 640, Misc. SCHONTUBE *v.* SUPREME COURT OF WISCONSIN; and

No. 675, Misc. SPRINGFIELD *v.* CARTER, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted.

No. 606. NEW YORK TIMES CO. *v.* SULLIVAN. Supreme Court of Alabama. Certiorari granted. *Herbert Brownell, Thomas F. Daly, Herbert Wechsler* and *Marvin E. Frankel* for petitioner. *Sam Rice Baker, M. Roland Nachman, Jr.* and *Calvin Whitesell* for respondent. Reported below: 273 Ala. 656, 144 So. 2d 25.

No. 609. ABERNATHY ET AL. *v.* SULLIVAN. Supreme Court of Alabama. Certiorari granted. *I. H. Wachtel, Charles S. Conley, Benjamin Spiegel* and *Raymond S. Harris* for petitioners. *Sam Rice Baker, M. Roland Nachman, Jr.* and *Calvin Whitesell* for respondent. Reported below: 273 Ala. 656, 144 So. 2d 25.

No. 535. DENNIS *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. Supreme Court of Utah. Certiorari granted. *Calvin W. Rawlings, Harold E. Wallace, Brigham E. Roberts* and *Wayne L. Black* for petitioner. *Dennis McCarthy* for respondent. Reported below: 13 Utah 2d 249, 372 P. 2d 3; 14 Utah 2d 68, 377 P. 2d 493.

No. 573. PARSONS, U. S. DISTRICT JUDGE, *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 7th Cir. Certiorari granted. *John J. Naughton* for petitioner. *Philip W. Tone* for respondent. Reported below: 307 F. 2d 924.

No. 593. DURFEE ET UX. *v.* DUKE. C. A. 8th Cir. Certiorari granted. *Harold W. Kauffman* for petitioners. *R. A. Brown* for respondent. Reported below: 308 F. 2d 209.

No. 544. FOTI *v.* IMMIGRATION AND NATURALIZATION SERVICE. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Question 1 presented by the petition which reads as follows:

"(1) Whether or not the Circuit Court of Appeals has jurisdiction to review the final orders of the Special Inquiry Officer authorized by the Attorney-General to be made during the course of deportation proceedings?"

James J. Cally for petitioner. *Solicitor General Cox* for respondent. Reported below: 308 F. 2d 779.

Certiorari Denied. (See also No. 445, ante, p. 231; No. 545, ante, p. 232; No. 570, ante, p. 233; No. 572, ante, p. 233; No. 578, ante, p. 234; No. 584, ante, p. 235; No. 625, Misc., ante, p. 235; No. 635, Misc., ante, p. 231; and Misc. Nos. 449, 482 and 680, supra.)

No. 323. SMITH *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Herbert S. Thatcher* and *Edward D. Cowart* for petitioner. *Richard W. Ervin*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent. Reported below: 123 So. 2d 700.

No. 451. LAUDENSLAGER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Morris J. Oppenheim* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for respondent. Reported below: 305 F. 2d 686.

No. 499. BALDWIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Harry C. Kinne* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *John M. Brant* for the United States. Reported below: 307 F. 2d 577.

No. 376. COBB *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Robert L. Carter* and *Donald L. Hollowell* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *G. Hughel Harrison* and *John S. Harrison,* Assistant Attorneys General, for respondent. Reported below: 218 Ga. 10, 126 S. E. 2d 231.

No. 531. BURNS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Vincent M. Casey* for petitioner. *Harold Kaminsky* for respondent.

No. 536. KEININGHAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Kenneth D. Wood* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 113 U. S. App. D. C. 295, 307 F. 2d 632.

No. 550. INTERNATIONAL HARVESTER CO. ET AL. *v.* CITY OF KANSAS CITY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. *Frederick Bernays Wiener* and *J. Donald Lysaught* for petitioners. *Charles S. Rhyne, Thomas P. Brown III* and *Alfred J. Tighe, Jr.* for respondents. *William M. Ferguson,* Attorney General of Kansas, for the State of Kansas, as *amicus curiae,* in opposition. Reported below: 308 F. 2d 35.

No. 562. PLISCO ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Clifford Allder* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 113 U. S. App. D. C. 177, 306 F. 2d 784.

No. 533. DYER *v.* MURRAY, TRUSTEE, ET AL. Supreme Judicial Court of Maine. Certiorari denied. Petitioner *pro se*. *Robinson Verrill* and *John A. Kendrick* for respondents. Reported below: 158 Me. 98, 179 A. 2d 307.

No. 539. PRICE ET AL. *v.* CHRISTIAN, SECRETARY OF STATE OF OKLAHOMA, ET AL. Supreme Court of Oklahoma. Certiorari denied. *Jas. A. Rinehart, Leon S. Hirsh* and *James C. Harkin* for petitioners. *Norman E. Reynolds, Jr.* for respondents. Reported below: 373 P. 2d 1017.

No. 547. REINSURANCE AGENCY, INC., *v.* LIBERTY NATIONAL INSURANCE CO. C. A. 9th Cir. Certiorari denied. *W. H. Langroise* for petitioner. Reported below: 307 F. 2d 164.

No. 548. STOWE-WOODWARD, INC., *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Robert Haydock, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Marselli* for the United States. Reported below: 306 F. 2d 678.

No. 549. WITTE ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Peter B. Wells* and *S. W. Plauche, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: 306 F. 2d 81.

No. 552. RAGLAND ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *R. R. Ryder* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 306 F. 2d 732.

No. 551. LOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John H. Crooker, Leroy Denman Moody, C. Anthony Friloux, Jr., Joe S. Moss, C. W. Wellen* and *William M. Ryan* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John P. Burke* for the United States. Reported below: 309 F. 2d 115.

No. 553. ASSOCIATED TELEPHONE & TELEGRAPH CO. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John J. Boland, Theodore F. Brophy, Robert Adelson* and *Robert P. Adelman* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Roberts* and *Harold C. Wilkenfeld* for the United States. *George E. Cleary* for Commerce & Industry Association of New York, Inc., as *amicus curiae,* in support of the petition. Reported below: 306 F. 2d 824.

No. 555. SWALLOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 307 F. 2d 81.

No. 556. BRIDGEPORT FEDERAL SAVINGS & LOAN ASSN. *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 3d Cir. Certiorari denied. *William B. Koch* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the Federal Home Loan Bank Board, and *Henry W. Sawyer III* and *Raymond K. Denworth* for Quaker City Federal Savings & Loan Assn., respondents. Reported below: 307 F. 2d 580.

No. 557. FLORA CONSTRUCTION CO. *v.* FIREMAN'S FUND INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 307 F. 2d 413.

No. 560. COLTON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* and *George G. Gallantz* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 306 F. 2d 633.

No. 561. BEAVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Hayden C. Covington* and *Richard M. Welling* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 309 F. 2d 273.

No. 564. WASHINGTON EX REL. SHERMAN *v.* BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSN. ET AL. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *T. M. Royce* for respondents. Reported below: See 58 Wash. 2d 1, 354 P. 2d 888.

No. 565. ISBRANDTSEN COMPANY, INC., *v.* MAXIMO ET AL. C. A. 2d Cir. Certiorari denied. *Maurice A. Krisel* for petitioner. *Lee Pressman* and *David Scribner* for respondents. Reported below: 305 F. 2d 941.

No. 567. GOLD FUEL SERVICE, INC., *v.* ESSO STANDARD OIL CO. C. A. 3d Cir. Certiorari denied. *Sam Weiss* and *Michael J. Pappas* for petitioner. *Burtis W. Horner* for respondent. Reported below: 306 F. 2d 61.

No. 577. PEARMAN *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 4th Cir. Certiorari denied. *Clay S. Crouse* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for respondent. Reported below: 307 F. 2d 573.

No. 576. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI, *v.* KENNEDY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson*, Attorney General of Mississippi, *Dugas Shands, Will S. Wells* and *Guy N. Rogers*, Assistant Attorneys General, *Peter M. Stockett, Jr.* and *Darryl Hurt*, Special Assistant Attorneys General, and *M. M. Roberts* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent. Reported below: 306 F. 2d 222.

No. 580. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 308 F. 2d 266.

No. 587. MUSKEGON PISTON RING CO. *v.* OLSEN ET AL. C. A. 6th Cir. Certiorari denied. *Peter P. Price, Robert C. C. Heaney* and *J. Roger Wollenberg* for petitioner. *Harold M. Street* for respondents. Reported below: 307 F. 2d 85.

No. 589. TEXAS & NEW ORLEANS RAILROAD CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 5th Cir. Certiorari denied. *Tom M. Davis* and *Palmer Hutcheson, Jr.* for petitioners. *Wayland K. Sullivan* for respondents. Reported below: 307 F. 2d 151.

No. 596. SEARS, ROEBUCK & CO. ET AL. *v.* JONES ET AL. C. A. 10th Cir. Certiorari denied. *Cedric W. Porter* and *Philip H. Sheridan* for petitioners. *Herbert J. Jacobi, Samuel L. Davidson* and *Robert B. Jacobi* for respondents. Reported below: 308 F. 2d 705.

No. 581. WHITSON *v.* FIDELITY & DEPOSIT CO. OF MARYLAND. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Frank E. Horka* for respondent. Reported below: 205 Cal. App. 2d 713, 23 Cal. Rptr. 491.

No. 591. NELSON-RYAN FLIGHT SERVICE, INC., *v.* LANGE, TRUSTEE. Supreme Court of Minnesota. Certiorari denied. *William D. Donnelly* for petitioner. *Robert Wm. Rischmiller* for respondent. Reported below: 263 Minn. 152, 116 N. W. 2d 266.

No. 605. LIPSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Isidor Ostroff* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 309 F. 2d 521.

No. 542. WESTERN AIR LINES, INC., *v.* CITY AND COUNTY OF SAN FRANCISCO. District Court of Appeal of California, First Appellate District. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Hugh W. Darling* for petitioner. *Thomas M. O'Connor, Robert M. Desky* and *Harold C. Faulkner* for respondent. Reported below: 204 Cal. App. 2d 105, 22 Cal. Rptr. 216.

No. 27, Misc. MORRIS *v.* UNIVERSITY OF TEXAS ET AL. Supreme Court of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson*, Attorney General of Texas, and *Pat Bailey, W. O. Shultz* and *Malcolm Quick*, Assistant Attorneys General, for respondents. Reported below: —— Tex. ——, 352 S. W. 2d 947.

No. 593, Misc. HUBBARD *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 595. WELCH, DOING BUSINESS AS WELCH TRUCKING CO., ET AL. *v.* RUNGE. C. A. 5th Cir. Certiorari denied. *Lucian Touchstone* for petitioners. Reported below: 307 F. 2d 829.

No. 598. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, *v.* HUMPHREYS. Supreme Court of Appeals of Virginia. Certiorari denied. *Beecher E. Stallard* and *Francis X. Ward* for petitioner. Reported below: 203 Va. 781, 127 S. E. 2d 98.

No. 599. FREED *v.* NEW YORK. Court of Special Sessions of City of New York, Second Judicial Department. Certiorari denied. *Sidney G. Sparrow* for petitioner. *Frank D. O'Connor* and *Benj. J. Jacobson* for respondent.

No. 602. CONNER AIR LINES, INC., ET AL. *v.* AVIATION CREDIT CORP. C. A. 5th Cir. Certiorari denied. *Don G. Nicholson* for petitioners. *Robert V. Smith* and *Laurence A. Schroeder* for respondent. Reported below: 307 F. 2d 685.

No. 608. HERMETIC SEAL PRODUCTS CO. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Louis A. Tepper* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Morton Hollander* and *David L. Rose* for the United States. Reported below: 307 F. 2d 809; 309 F. 2d 482.

No. 558. AERONAUTICAL COMMUNICATIONS EQUIPMENT, INC., *v.* PIERCE, EXECUTRIX. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Walter H. Free* for petitioner. *David Rines, Robert H. Rines* and *Walter Humkey* for respondent. Reported below: 307 F. 2d 790.

No. 612. KAISER ET AL. *v.* PRICE-FEWELL, INC. Supreme Court of Arkansas. Certiorari denied. *Eugene R. Warren* and *Bruce T. Bullion* for petitioners. *Pat Mehaffy* for respondent. Reported below: 235 Ark. 295, 359 S. W. 2d 449.

No. 546. EASTLAND ET UX. *v.* CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Allen E. Pye* and *J. Robt. Dobbs, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Harold C. Wilkenfeld* for respondent. Reported below: 307 F. 2d 478.

No. 568. BATTEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *A. Harry Crane* for petitioners. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: 306 F. 2d 580.

No. 579. MILLER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles Allan Hart, Jr.* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Sherman L. Cohn* for the United States. Reported below: 303 F. 2d 703.

No. 594. MUSE *v.* UNITED STATES CASUALTY CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 306 F. 2d 30.

No. 588. ZIMMERMAN *v.* BOARD OF EDUCATION OF NEWARK ET AL. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. *Daniel H. Pollitt* and *Nicholas J. LaRocca* for petitioner. *Jacob Fox* for respondents. Reported below: 38 N. J. 65, 183 A. 2d 25.

No. 141, Misc. ODOM *v.* HEARD, ACTING CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 366, Misc. COREY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 305 F. 2d 232.

No. 456, Misc. PICCOTT *v.* SINCLAIR, WARDEN. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 589, Misc. BUSH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 112 U. S. App. D. C. 173, 301 F. 2d 255.

No. 604, Misc. GRIEWSKI *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 606, Misc. BURKS *v.* KLINGER, WARDEN, ET AL. Supreme Court of California. Certiorari denied. *George Olshausen* for petitioner.

No. 607, Misc. YOUNG *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 373 P. 2d 273.

No. 611, Misc. HARRIS *v.* REINCKE, WARDEN. Superior Court of Connecticut, Hartford County. Certiorari denied.

No. 614, Misc. SNYDER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *David Kanner* and *Stanford Shmukler* for petitioner. Reported below: 408 Pa. 253, 182 A. 2d 495.

No. 617, Misc. NAYLOR *v.* WALKER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 620, Misc. POE *v.* OREGON. Supreme Court of Oregon. Certiorari denied.

No. 622, Misc. JANOSKO *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, and *Anthony J. Lokot*, Assistant Attorney General, for respondent.

No. 623, Misc. COGDELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 616, Misc. BASSETT *v.* TAHASH, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 263 Minn. 477, 116 N. W. 2d 564.

No. 618, Misc. LEHMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 621, Misc. SHIPMAN *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 243 Ind. 245, 183 N. E. 2d 823.

No. 624, Misc. SWANSON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 204 Cal. App. 2d 169, 22 Cal. Rptr. 178.

No. 628, Misc. WELLER *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 633, Misc. COOPER *v.* WIMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 145 So. 2d 216.

No. 639, Misc. MOORE *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 205 Cal. App. 2d 754, 23 Cal. Rptr. 502.

No. 643, Misc. SIRES *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 636, Misc. HUMPHRIES *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 637, Misc. BETTS *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 641, Misc. GILBERT *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 650, Misc. KILGALLEN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 651, Misc. JONES *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 653, Misc. HENDERSON *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 708, Misc. BRATCHER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 113. CAMPBELL ET AL. *v.* PENNSYLVANIA, *ante*, p. 901;

No. 124. ATLAS SCRAPER & ENGINEERING CO. *v.* PURSCHE, *ante*, p. 911;

No. 383. COPPOLLA ET AL. *v.* UNITED STATES, *ante*, p. 920;

No. 538. CAMPISI *v.* UNITED STATES, *ante*, p. 925;

No. 389. DILLARD *v.* JACKSON'S ATLANTA READY MIX CONCRETE CO., INC., *ante*, p. 902;

No. 416. IN RE ALFORD, *ante*, p. 910; and

No. 418. NICHOLS & COMPANY *v.* UNITED STATES, *ante*, p. 911. Petitions for rehearing denied.

No. 430, Misc. McDowell *v.* United States, *ante*, p. 927;

No. 445, Misc. La Rose *v.* Tahash, Warden, *ante*, p. 114;

No. 541, Misc. Lipscomb *v.* United States, *ante*, p. 928; and

No. 608, Misc. Thomas *v.* Heritage, Warden, *ante*, p. 907. Petitions for rehearing denied.

No. 25. Presser *v.* United States, *ante*, p. 71. Petition for rehearing denied. Mr. Justice Goldberg took no part in the consideration or decision of this application.

January 14, 1963.

Miscellaneous Orders.

No. 511. Bush *v.* Texas. Certiorari, *ante*, p. 859, to the Court of Criminal Appeals of Texas. The motion of American and Dallas Civil Liberties Unions for leave to file a brief, as *amicus curiae*, is granted. *Charles W. Webster* on the motion. *Charles Alan Wright* for petitioner, in opposition.

No. 579, Misc. Pardee *v.* Burke, Warden. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *John W. Reynolds*, Attorney General of Wisconsin, and *William A. Platz*, Assistant Attorney General, for respondent.

No. 588, Misc. Bolin *v.* Goodman, Warden, et al. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Daniel R. McLeod*, Attorney General of South Carolina, and *Clarence T. Goolsby, Jr.*, Assistant Attorney General, for respondents.

Probable Jurisdiction Noted.

No. 604. DIVISION 1287, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, ET AL. *v.* MISSOURI. Appeal from the Supreme Court of Missouri. Probable jurisdiction noted. *Bernard Cushman, Bernard Dunau* and *John Manning* for appellants. *Thomas F. Eagleton,* Attorney General of Missouri, and *J. Gordon Siddens* and *John C. Baumann,* Assistant Attorneys General, for appellee. Reported below: 361 S. W. 2d 33.

Certiorari Granted. (*See also No. 528, ante, p. 537; and No. 729, Misc., ante, p. 541.*)

No. 628. LINER ET AL. *v.* JAFCO, INC., ET AL. Court of Appeals of Tennessee. Certiorari granted. *H. G. B. King* for petitioners. *John A. Chambliss, Jr.* for respondents.

No. 632. UNITED STATES *v.* ZACKS ET UX. Court of Claims. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Mildred L. Seidman* for the United States. *Scott P. Crampton* for respondents. Reported below: 150 Ct. Cl. 814, 280 F. 2d 829.

Certiorari Denied. (*See also Misc. Nos. 579 and 588, supra.*)

No. 627. AEROVIAS INTERAMERICANAS DE PANAMA, S. A., ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA. C. A. 5th Cir. Certiorari denied. *Philip Schleit, J. Leo McShane* and *William D. Donnelly* for petitioners. *Chester Bedell* for respondent. Reported below: 307 F. 2d 802.

No. 597. WIGHT ET AL. *v.* MONTANA-DAKOTA UTILITIES CO. C. A. 9th Cir. Certiorari denied. *William G. Sumners, Jr.* for petitioners. *Arthur F. Lamey* for respondent. Reported below: 299 F. 2d 470.

No. 613. BERENSON ET AL. *v.* MUCHARD. C. A. 5th Cir. Certiorari denied. *Thomas Gibbs Gee* and *Robert J. Hearon, Jr.* for petitioners. *Coleman Gay* for respondent. Reported below: 307 F. 2d 368.

No. 619. TRI-PHARMACY, INC., ET AL. *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Carl J. Batter, Carl J. Batter, Jr.* and *Karl G. Sorg* for petitioners. Reported below: 203 Va. 723, 127 S. E. 2d 89.

No. 620. LAING *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Alex N. Apostolou* for petitioner. Reported below: 203 Va. 682, 127 S. E. 2d 142.

No. 623. RICKENBACKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *C. Dickerman Williams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 309 F. 2d 462.

No. 624. SEARS, ROEBUCK & CO. *v.* GUGEL. C. A. 6th Cir. Certiorari denied. *Burton Y. Weitzenfeld* for petitioner. *Nuel N. Donley* for respondent. Reported below: 308 F. 2d 131.

No. 626. FRENCH ET AL. *v.* TOWN OF CLINTWOOD EX REL. JOHNSON. Supreme Court of Appeals of Virginia. Certiorari denied. *S. H. Sutherland* for petitioners. Reported below: 203 Va. 562, 125 S. E. 2d 798.

No. 636. WOOD ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 571. HARLEY *v.* TEHAN, U. S. DISTRICT JUDGE. Motion of Louisville & Nashville Railroad Co. for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Sidney M. Eisenberg* for petitioner. *Gerald J. Kahn* for Louisville & Nashville Railroad Co., as *amicus curiae,* in opposition.

No. 359, Misc. ODELL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. John W. Reynolds,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent.

No. 528, Misc. FRIERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 299 F. 2d 763.

No. 529, Misc. PLACONA *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 605, Misc. THOMAS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 554, Misc. IN RE CHESTER. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier*, Assistant Attorney General, for the State of California.

No. 572, Misc. ALLOCCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon Polsky* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 305 F. 2d 704.

No. 661, Misc. STACEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner. Reported below: 25 Ill. 2d 258, 184 N. E. 2d 866.

No. 664, Misc. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 309 F. 2d 749.

No. 670, Misc. MORROW *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 673, Misc. WRIGHT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 799, Misc. FAUST *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *T. W. Bruton*, Attorney General of North Carolina, and *Harry W. McGalliard*, Assistant Attorney General, for respondent. Reported below: 307 F. 2d 869.

No. 681, Misc. RATHBUN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

Rehearing Denied.

No. 363. GINSBURG *v.* LING, U. S. DISTRICT JUDGE, *ante*, p. 932;

No. 443. TURNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 922;

No. 478. STRATTON ET AL. *v.* DALY, *ante*, p. 934;

No. 488. GUNDERSON BROS. ENGINEERING CORP. *v.* MERRITT-CHAPMAN & SCOTT CORP., *ante*, p. 935;

No. 62, Misc. LIEBERMAN *v.* OHIO, *ante*, p. 925;

No. 326, Misc. DELEVAY *v.* NATIONAL SAVINGS & TRUST CO., *ante*, p. 926;

No. 403, Misc. LIEBERMAN *v.* COLUMBUS BAR ASSOCIATION, *ante*, p. 927; and

No. 598, Misc. IN RE DISBARMENT OF GATELY, *ante*, p. 918. Petitions for rehearing denied.

No. 467. ALVADO ET AL. *v.* GENERAL MOTORS CORP., *ante*, p. 925. Petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application.

JANUARY 21, 1963.

Miscellaneous Orders.

No. 332. BOESCHE, ADMINISTRATOR, *v.* UDALL, SECRETARY OF THE INTERIOR. Certiorari, *ante*, p. 886, to the United States Court of Appeals for the District of Columbia Circuit. The motion of the Rocky Mountain Oil & Gas Assn. for leave to present oral argument, as *amicus curiae*, is denied. *Scott A. Pfohl* and *A. G. McClintock* on the motion.

No. 12, Original. HAWAII *v.* BELL. This case is set for argument on Monday, October 14, 1963, and a total of two hours is allowed for oral argument. [For earlier order herein, see *ante,* p. 804.]

No. 150. SILVER, DOING BUSINESS AS MUNICIPAL SECURITIES CO., ET AL. *v.* NEW YORK STOCK EXCHANGE. Certiorari, *ante,* p. 808, to the United States Court of Appeals for the Second Circuit. The motion of the Solicitor General, on behalf of the United States, for leave to participate in oral argument, as *amicus curiae,* is granted and thirty minutes are allotted for that purpose. Counsel for the petitioners and the respondent are also allotted an additional fifteen minutes to argue in this case. *Solicitor General Cox* on the motion.

No. 661. MISSISSIPPI ET AL. *v.* MEREDITH. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion of *John C. Satterfield* for leave to withdraw his appearance as counsel for the petitioners is granted.

Certiorari Granted.

No. 407. HUMPHREY ET AL. *v.* MOORE ET AL. Court of Appeals of Kentucky. Certiorari granted. *H. Solomon Horen* and *Mozart G. Ratner* for petitioners. *John Y. Brown* for Moore et al., and *Newell N. Fowler* for Dealers Transport Co., respondents. Reported below: 356 S. W. 2d 241.

No. 569. COREY *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *Russell Morton Brown* and *Maurice C. Goodpasture* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 307 F. 2d 839.

No. 408. General Drivers, Warehousemen & Helpers, Local Union No. 89, *v.* Moore et al. Court of Appeals of Kentucky. Certiorari granted. *David Previant, Herbert S. Thatcher* and *Ralph H. Logan* for petitioner. *John Y. Brown* for Moore et al., and *Newell N. Fowler* for Dealers Transport Co., respondents. Reported below: 356 S. W. 2d 241.

No. 618. Securities and Exchange Commission *v.* Capital Gains Research Bureau, Inc., et al. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Stephen J. Pollak, Peter A. Dammann, David Ferber* and *Walter P. North* for petitioner. *Leo C. Fennelly* for respondents. Reported below: 300 F. 2d 745; 306 F. 2d 606.

No. 778, Misc. Jackson *v.* Denno, Warden. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. Case transferred to the appellate docket. *Norman Redlich* for petitioner. Reported below: 309 F. 2d 573.

Certiorari Denied. (*See also No. 607, ante, p. 577.*)

No. 502. Rains *v.* Nebraska. Supreme Court of Nebraska. Certiorari denied. *Claude T. Wood* for petitioner. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Cecil S. Brubaker,* Assistant Attorney General, for respondent. Reported below: 173 Neb. 586, 114 N. W. 2d 399.

No. 616. Miller *v.* Udall, Secretary of the Interior. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Chester C. Shore* for petitioner. *Solicitor General Cox, S. Billingsley Hill* and *Hugh Nugent* for respondent. Reported below: 113 U. S. App. D. C. 339, 307 F. 2d 676.

No. 634. McDANIEL *v.* CAMPBELL, WYANT & CANNON FOUNDRY CO. ET AL. Supreme Court of Michigan. Certiorari denied. *Thomas W. Finucan* for petitioner. *Richard W. Galiher* for respondents. Reported below: 367 Mich. 356, 116 N. W. 2d 835.

No. 637. LEMONS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *R. R. Ryder* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 309 F. 2d 168.

No. 638. JEW TEN, ALIAS GEORGE K. JUE, ALIAS JUE GAR KING, ALIAS CHOW KA KING, *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for respondent. Reported below: 307 F. 2d 832.

No. 640. EDENS *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Gus R. Camp* for petitioner. Reported below: 235 Ark. 178, 359 S. W. 2d 432.

No. 642. KANSAS CITY TRANSIT, INC., *v.* KANSAS CITY TERMINAL RAILWAY CO. Supreme Court of Missouri. Certiorari denied. *Albert Thomson* for petitioner. *Richard S. Righter* for respondent. Reported below: 359 S. W. 2d 698.

No. 643. NATURE FOOD CENTRES, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *William W. Goodrich* for the United States. Reported below: 310 F. 2d 67.

No. 644. AMERICAN STEVEDORES, INC., *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John T. Reges* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 310 F. 2d 47.

No. 651. WISCONSIN ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Roy G. Tulane,* Assistant Attorney General of Wisconsin, *Nicholas V. Olds,* Assistant Attorney General of Michigan, *Newell A. Clapp, Wendell Lund* and *Joseph B. Levin* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Morton Hollander* and *Kathryn H. Baldwin* for respondent. Reported below: 113 U. S. App. D. C. 183, 306 F. 2d 790.

No. 80, Misc. WAKIN *v.* KEENAN, WORKHOUSE SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 546, Misc. BUSH *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Carl E. F. Dally* for respondent. Reported below: 172 Tex. Cr. R. —, 358 S. W. 2d 384.

No. 566, Misc. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 302 F. 2d 279.

No. 743, Misc. MARTIN *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se. John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent. Reported below: 361 S. W. 2d 654.

No. 649. SILVAS *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. *John P. Frank* for petitioner. *Robert W. Pickrell,* Attorney General of Arizona, and *Stirley Newell,* Assistant Attorney General, for respondent. Reported below: 91 Ariz. 386, 372 P. 2d 718.

Rehearing Denied.

No. 453. IN RE ALKER, *ante,* p. 923;

No. 495. INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* CENTRAL AIRLINES, INC., *ante,* p. 934;

No. 510. TEXAS CARBONATE CO. *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, *ante,* p. 940; and

No. 522. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA ET AL. *v.* LUTES ET AL., *ante,* p. 941. Petitions for rehearing denied.

No. 23, Misc., October Term, 1959. IN RE DISBARMENT OF ALKER, *ante,* p. 918. Petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this application.

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2. *Sherman Act—Conspiracy between union and self-employed grease peddlers—Decree ordering union to expel grease peddlers.*—Where District Court found that only support of union had enabled self-employed grease peddlers to destroy free competition in purchase and sale of waste grease, in violation of § 1 of Sherman Act, decree ordering union to expel all self-employed grease peddlers from membership was sustained, notwithstanding Norris-LaGuardia Act and labor exemption provisions of Clayton Act. Meat Drivers v. United States, p. 94.

3. *Sherman Act—Airlines—Allocation of routes and agreements not to compete.*—Antitrust suit charging violations of Sherman Act by an airline and a holding company organizing a jointly controlled subsidiary airline, with allocation of routes and agreements that the two airlines would not compete, presented questions entrusted by Congress to Civil Aeronautics Board, and complaint should have been dismissed. Pan American World Airways v. United States, p. 296.

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5. *Supreme Court—Direct appeal from District Court—Dismissal of indictment.*—When District Court's dismissal of indictment for using mails to defraud was based on its construction of 18 U. S. C. § 1341, case was properly appealed direct to Supreme Court under 18 U. S. C. § 3731. United States v. Sampson, p. 75.

6. *Supreme Court—Certiorari—Judgment of state court allowing only temporary injunction.*—When decision of State Supreme Court allowed issuance of only temporary injunction against peaceful picketing by labor union, in case involving at least arguable violation of National Labor Relations Act, its judgment was "final," within meaning of 28 U. S. C. § 1257, and Supreme Court had jurisdiction on certiorari. Construction Laborers v. Curry, p. 542.

7. *State courts—Suits against national banks—Venue.*—Under R. S. § 5198, a suit in a state court against a national bank may not be maintained in a county or city other than that in which it is located, notwithstanding a state venue statute providing otherwise. Mercantile National Bank v. Langdeau, p. 555.

KENTUCKY. See **Constitutional Law**, III.

LABOR. See also **Antitrust Acts**, 2; **Constitutional Law**, II, 2; **Jurisdiction**, 6; **Transportation**, 3.

1. *National Labor Relations Act—Picketing—Jurisdiction of state court to enjoin.*—Peaceful picketing of premises of wholly owned subsidiary of employer involved in labor dispute was arguably protected by § 7 of National Labor Relations Act, and state court was without jurisdiction to enjoin such picketing or to punish persons for violating temporary injunction against such picketing. Ex parte George, p. 72.

LABOR—Continued.

2. *National Labor Relations Act—Peaceful picketing—Jurisdiction of state court to enjoin.*—When peaceful picketing was alleged to be for purpose of forcing employer to hire only union labor, and there was at least an arguable violation of § 8 (b) of the National Labor Relations Act, case was within exclusive jurisdiction of Board, and state court had no jurisdiction to adjudicate controversy. Construction Laborers v. Curry, p. 542.

3. *National Labor Relations Act—Suits in state courts for violation of labor contracts—Right of individual employees to maintain.*—Action for damages for breach of a collective bargaining contract between employer and labor organization may be maintained in state court by individual employee who is member of such labor organization—even when conduct involved is also unfair labor practice within jurisdiction of National Labor Relations Board. Smith v. Evening News Assn., p. 195.

4. *National Labor Relations Act—"Affecting commerce"—Local distributor of fuel oil imported from outside State.*—Unfair labor practices of local distributor of fuel oil purchased from a supplier who had imported them from outside State "affected" commerce, within meaning of Act. Labor Board v. Reliance Fuel Oil Corp., p. 224.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959. See **Transportation**, 3.

LEGAL ETHICS. See **Constitutional Law**, IV.

LIENS. See **Taxation**, 2.

LIMESTONE. See **Taxation**, 1.

MAILS. See **Criminal Law.**

MAINTENANCE. See **Constitutional Law**, IV.

MALPRACTICE. See **Constitutional Law**, IV.

MANDAMUS. See **Procedure**, 3.

MERGERS. See **Transportation**, 2.

MICHIGAN. See **Labor**, 3.

MILK. See **Constitutional Law**, VII, 2.

MILLER ACT. See **Procedure**, 6; **Sureties.**

MINING. See **Procedure**, 9; **Taxation**, 1.

MONOPOLY. See **Antitrust Acts**, 1–3.

MORTGAGES. See **Taxation**, 2.

MOTION PICTURES. See **Antitrust Acts**, 1.

MOTOR CARRIERS. See **Transportation**, 1–3.

NARCOTICS CONTROL ACT. See **Evidence**, 2.

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE. See **Constitutional Law**, IV.

NATIONAL BANKS. See **Jurisdiction**, 2, 7.

NATIONAL LABOR RELATIONS ACT. See **Labor**, 1–4.

NATURAL GAS ACT.

Increased rate schedule—Interim order for rate reduction and refund—Deferral of some issues.—When natural gas pipeline company filed increased rate schedules for six different zones, all such rates being predicated, in part, on claim to 7% rate of return on investment, Federal Power Commission acted properly in determining that rate of return was excessive, ordering interim rate reduction and immediate refund of excess, and deferring determination of other issues, including allocation of over-all costs among different zones. Federal Power Comm'n v. Tennessee Gas Transmission Co., p. 145.

NEGROES. See **Constitutional Law**, IV.

NEW YORK. See **Constitutional Law**, I; **Evidence**, 1; **Taxation**, 2.

NORRIS-LaGUARDIA ACT. See **Antitrust Acts**, 2.

NOTICE. See **Constitutional Law**, I.

NOTICE OF APPEAL. See **Procedure**, 4, 8.

PAROLE. See **Habeas Corpus.**

PICKETING. See **Labor**, 1–2.

PIPELINES. See **Natural Gas Act.**

PLEADINGS. See **Procedure**, 5, 6.

POSTAL SERVICE. See **Criminal Law.**

PRICE DISCRIMINATION. See **Antitrust Acts**, 4.

PRICE FIXING. See **Constitutional Law**, VII, 2.

PRIORITIES. See **Taxation**, 2.

PROBABLE CAUSE. See **Evidence**, 2.

PROCEDURE. See also **Antitrust Acts**, 3; **Constitutional Law**, I; V; **Evidence**, 1–2; **Government Employees**; **Jurisdiction**; **Natural Gas Act**; **Transportation**, 1–3.

1. *Supreme Court—Direct appeal from District Court—Decision per curiam reversing judgment below—Scope and effect.*—This

PROCEDURE—Continued.

Court's decision *per curiam* reversing the judgment below on the Government's earlier direct appeal in this case necessarily established that (1) this Court had jurisdiction of that appeal, (2) the relevant provisions of the Agricultural Adjustment Act of 1938 embraced the conduct of appellee complained of, (3) the Act was constitutional as applied in the premises, and (4) the Government was entitled to the relief sought, subject only to the District Court's resolution of appellee's procedural defense to the effect that the Government had failed to comply with conditions requisite to the effective establishment of a wheat acreage allotment for appellee. United States v. Haley, p. 18.

2. *Supreme Court—Appeal from state conviction—Death of appellant.*—In case in which appellant had been convicted in an Ohio court of a state crime, had been sentenced to imprisonment and to pay costs of prosecution, and had died while his appeal was pending in this Court, a motion to substitute the administratrix of his estate was granted and the appeal was dismissed for want of a substantial federal question. Wetzel v. Ohio, p. 62.

3. *Supreme Court—Mandamus—Judgment of District Court based on misunderstanding of Supreme Court's decision per curiam.*—When a judgment of a District Court denying the Government's motion for judgment was based on misconception of Supreme Court's decision *per curiam* reversing decision below on Government's earlier direct appeal, the Government's petition for writ of mandamus was granted; but formal writ would not be issued if District Court promptly took steps to set aside its judgment, to resolve appellee's procedural defense and to enter judgment accordingly. United States v. Haley, p. 18.

4. *Courts of Appeals—Notice of appeal—Scope.*—When District Court dismissed complaint for failure to state claim on which relief might be granted, plaintiff moved to vacate judgment and amend complaint so as to state alternative theory of recovery, filed notice of appeal from judgment of dismissal before motion was ruled upon, and later filed second notice of appeal from denial of motion, Court of Appeals erred in narrowly reading second notice of appeal as applying only to denial of motion. Foman v. Davis, p. 178.

5. *District Courts—Denial of motion to vacate judgment dismissing complaint and to amend complaint—Abuse of discretion.*—In view of Federal Rule of Civil Procedure 15 (a), District Court abused discretion when it denied motion to vacate judgment dismissing complaint and to amend complaint so as to state alternative theory of recovery. Foman v. Davis, p. 178.

PROCEDURE—Continued.

6. *District Courts—Pleading counterclaims—Two different suits under Miller Act.*—In circumstances of case in which two different suits under Miller Act were brought in two different District Courts by same subcontractor against same general contractor and its surety, based on separate projects in the two districts, Federal Rule of Civil Procedure 13 (a) did not compel a counterclaim, based on a payment which had not been allocated as between the projects, to be made in whichever of the two suits the first responsive pleading was filed. Southern Construction Co. v. Pickard, p. 57.

7. *District Courts—Criminal trials—Motions attacking grand and petit jury arrays—Timeliness.*—Motions attacking grand and petit jury arrays, made more than four years after trial and conviction, were untimely under Federal Rule of Criminal Procedure 12 (b)(2), and relief from effect of that Rule was not warranted when both lower courts found that defendants were not prejudiced in any way by alleged illegalities in selection of juries. Shotwell Mfg. Co. v. United States, p. 341.

8. *District Courts—Notice of appeal—Extension of time.*—When appellant relied on District Court's extension of time within which to appeal and would suffer hardship if it were set aside, Court of Appeals should have let it stand, even if there was no showing of "excusable neglect based on a failure . . . to learn of the entry of the judgment," within meaning of Federal Rule of Civil Procedure 73 (a). Harris Truck Lines v. Cherry Meat Packers, p. 215.

9. *District Courts—Suit to condemn mining claims on public lands—Reference for administrative determination of validity of claims.*—Institution of condemnation suit in Federal District Court was appropriate way of obtaining immediate possession of outstanding mining claims on public lands needed for construction of dam; but District Court acted properly in granting writ of possession and then holding its hand until issue of validity of mining claims had been determined administratively by Bureau of Land Management. Best v. Humboldt Mining Co., p. 334.

PROCUREMENTS FOR FEDERAL GOVERNMENT. See **Constitutional Law**, VII, 1–2.

PUBLIC LANDS. See **Procedure**, 9.

RACIAL DISCRIMINATION. See **Constitutional Law**, IV.

REASONABLE GROUNDS. See **Evidence**, 2.

RELIGIOUS FREEDOM. See **Constitutional Law**, III.

REMEDIES. See **Transportation**, 1–3.

RES JUDICATA. See **Constitutional Law**, V.

RESTRAINT OF TRADE. See **Antitrust Acts**, 1–4.

RIVERS. See **Constitutional Law**, I.

ROBINSON-PATMAN ACT. See **Antitrust Acts**, 4.

RULES OF CIVIL PROCEDURE. See **Procedure**, 5–6, 8.

RULES OF CRIMINAL PROCEDURE. See **Evidence**, 1; **Procedure**, 7.

SEARCH AND SEIZURE. See **Evidence**, 2.

SECONDARY BOYCOTTS. See **Transportation**, 3.

SELF-INCRIMINATION. See **Constitutional Law**, VI; **Evidence**, 1.

SHERMAN ACT. See **Antitrust Acts**, 1–3.

SOLICITATION OF LEGAL BUSINESS. See **Constitutional Law**, IV.

SOUTH CAROLINA. See **Constitutional Law**, V.

SUBROGATION. See **Sureties.**

SUBSTITUTION OF PARTIES. See **Procedure**, 2.

SUNDAY CLOSING LAWS. See **Constitutional Law**, III.

SUPREMACY CLAUSE. See **Constitutional Law**, VII.

SUPREME COURT. See also **Jurisdiction**, 1–6; **Procedure**, 1–3.

1. Allotment of Justices among circuits, p. v.
2. Appointment of MR. JUSTICE GOLDBERG, p. xv.
3. Assignment of JUSTICES REED and BURTON (retired) to United States Court of Appeals for the District of Columbia Circuit, p. 802.
4. Assignment of MR. JUSTICE REED (retired) to United States Court of Claims, p. 883.
5. Retirement of MR. JUSTICE FRANKFURTER, p. VII.

SURETIES. See also **Procedure**, 6.

Payment bond on government contract—Subrogation—Bankruptcy.—When, by reason of contractor's default, a surety on a payment bond of contractor under Miller Act has been compelled to pay for labor and materials, the surety is entitled by subrogation to reimbursement from fund otherwise due contractor but withheld by Government—even though contractor is bankrupt and Government has turned such funds over to contractor's trustee in bankruptcy. Pearlman v. Reliance Ins. Co., p. 132.

TAXATION. See also **Constitutional Law,** VI.

1. *Income taxes—Depletion allowance—Gross income from mining.*—Taxpayer who mines limestone, crushes it, hauls the crushed product two miles to plant, and there, through the addition of other materials and further processing, manufactures the limestone into cement, which it sells, must base depletion allowance upon the value of the product of the "mining" when it reaches the crushed limestone stage, not upon the value of the finished cement. Riddell v. Monolith Portland Cement Co., p. 537.

2. *Federal tax liens—Subsequent state liens for real estate taxes and local assessments—Priority.*—In distributing proceeds of foreclosure sale of real estate, federal tax liens take priority over subsequently attached state liens for real estate taxes and local assessments, notwithstanding state statute providing that payments to discharge such state tax liens shall be deemed "expenses" of such a foreclosure sale. United States v. Buffalo Savings Bank, p. 228.

TELEVISION. See **Antitrust Acts,** 1.

TEXAS. See **Labor,** 1.

TIMELINESS. See **Procedure,** 7, 8.

TRANSPORTATION. See also **Antitrust Acts,** 3; **Constitutional Law,** VII, 1; **Jurisdiction,** 3.

1. *Motor carriers—Shipment at higher interstate rate instead of lower intrastate rate—Common law action to recover difference.*—Where Interstate Commerce Commission found practice unreasonable, complaint in common law action against motor carrier to recover difference between charges at higher interstate rate and lower intrastate rate on shipments from Buffalo, N. Y., to New York City stated cause of action, which was saved by § 216 (j) of Motor Carrier Act. Hewitt-Robins Inc. v. Eastern Freight-Ways, p. 84.

2. *Motor carriers—Application for approval of merger—Denial because of violation of § 5 (4).*—Interstate Commerce Commission's denial of approval of merger of two incorporated motor carriers, because their control or management in common interest had already been accomplished in violation of § 5 (4) by informal *de facto* relationships, was sustained; but its order that an individual applicant divest himself of stock in one of the corporations was reversed, because parties had not been heard on that issue. Gilbertville Trucking Co. v. United States, p. 115.

3. *Motor carriers—Disruption of service by union-induced boycott by connecting carriers—Choice of remedies.*—Grant of operating authority to new interstate carrier organized by short-line carriers

TRANSPORTATION—Continued.
because of union-induced boycott by existing trunk-line carriers, without findings as to effectiveness of other possible remedies, was improvident exercise of discretion by Interstate Commerce Commission; and District Court should have vacated order and remanded case to Commission for further consideration in light of enactment of Labor-Management Reporting and Disclosure Act of 1959. Burlington Truck Lines v. United States, p. 156.

UNIONS. See **Antitrust Acts,** 2; **Constitutional Law,** II, 2; **Labor,** 1–4; **Transportation,** 3.

VENUE. See **Jurisdiction,** 2, 7.

VETERANS. See **Government Employees.**

VIRGINIA. See **Constitutional Law,** IV; V; **Habeas Corpus; Jurisdiction,** 1.

VOLUNTARY DISCLOSURE. See **Constitutional Law,** VI.

WATERS. See **Constitutional Law,** I.

WORDS.

1. *"Affecting commerce."*—National Labor Relations Act. Labor Board v. Reliance Fuel Corp., p. 224.

2. *"Competitor."*—Clayton Act, § 2 (b). Federal Trade Comm'n v. Sun Oil Co., p. 505.

3. *"Custody."*—28 U. S. C. § 2241. Jones v. Cunningham, p. 236.

4. *"Exclusive jurisdiction."*—Constitution, Art. I, § 8, cl. 17. Paul v. United States, p. 245.

5. *"Final judgment."*—28 U. S. C. § 1257. N. A. A. C. P. v. Button, p. 415; Construction Laborers v. Curry, p. 542; Mercantile Nat. Bank v. Langdeau, p. 555.

6. *"For the purpose of executing" a fraudulent scheme.*—18 U. S. C. § 1341. United States v. Sampson, p. 75.

7. *"Gross income from mining."*—Internal Revenue Code of 1939. Riddell v. Monolith Portland Cement Co., p. 537.

8. *"Mining."*—Internal Revenue Code of 1939. Riddell v. Monolith Portland Cement Co., p. 537.

9. *"Prices . . . set by law or regulation."*—10 U. S. C. § 2306 (f). Paul v. United States, p. 245.

10. *"Probable cause."*—Fourth Amendment. Wong Sun v. United States, p. 471.

11. *"Rates or prices . . . not fixed by law or regulation."*—10 U. S. C. § 2304 (g). Paul v. United States, p. 245.

WORDS—Continued.

12. *"Reasonable grounds."*—Narcotics Control Act of 1956. Wong Sun v. United States, p. 471.

13. *"Required" to be heard by three-judge court.*—28 U. S. C. § 1253. Paul v. United States, p. 245; United States v. Georgia Public Service Comm'n, p. 285.

14. *"Unfair methods of competition."*—Federal Aviation Act, § 411. Pan American World Airways v. United States, p. 296.

15. *"Unfair practices."*—Federal Aviation Act, § 411. Pan American World Airways v. United States, p. 296.